UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
Washington, D. C.

SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE on complaints filed under THE PERISHABLE AGRICULTURAL COMMODITIES ACT

no. 1

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(These summaries cover all decisions which have not been published)

I N D E X

Sec. Dec. 209, November 18, 1932, Docket 204.

PHILLIPS & CO., INC., NORFOLK, VA. vs. BEN RANDAZZO, LOUISVILLE, KY.

It was alleged that Phillips & Co. sold Randazzo a car of U. S. No. 1 white potatoes at $4.75 per barrel delivered, the total net sale price being $764.00; that the potatoes shipped complied with the contract but were rejected without reasonable cause upon arrival in Louisville; that the sale was negotiated by W. R. Hyatt & Co. acting as brokers. After rejection the potatoes were resold, netting $340.40. Randazzo claimed that through error on the part of the complainant or railroad company the freight charges assessed on this car amounted to $444.00whereas it should have been $186.00; that the complainant failed for many days to have the matter of the freight adjusted; that before proper corrections were made the price of potatoes had fallen considerably; and that Hyatt and Company had been directed by the complainant to dispose of the potatoes to the best possible advantage.

The first question presented was: Did the parties enter into an enforceable contract? The record shows that on June 17, 1930 the broker wired the complainant to divert to Randazzo a car of U.S. 1's at $4.75 delivered. On April 14, 1931 Randazzo wrote the Department that he found that the car was ordered from W. R. Hyatt in Louisville. The respondent was advised under date of June 18, 1930 that the broker had received telegraphic confirmation of his order. The Secretary therefore held that the record supports the allegations concerning the details of the claimed sale.

The second question was: Did the error as to the amount of the transportation charges, the resulting delay in having adjustments made, and the decline in market render the respondent's rejection justifiable? The complainant was to deliver the potatoes to Randazzo in Louisville for a price of $4.75 per barrel less 93¢ per barrel freight charges. Title did not pass until the acceptance by the respondent at destination. It was therefore complainant's obligation under the contract to make it possible for Randazzo to secure the potatoes at Louisville by paying the correct rate of 93¢ per barrel. It was immaterial whether the error respecting such freight charges was the complainant's or the carrier's, the sale being upon a delivered basis respondent could decline to accept on any terms except those agreed upon. The Secretary therefore held that the record failed to show that Randazzo's failure to accept was without reasonable cause and dismissed the complaint.

S-221, Dec. 2, 1932, Docket 461:

REDDING BROKERAGE CO., LINCOLN, NEBR. vs. Wm. G. ROE & CO., WINTER HAVEN, FLA.

Complainant acting as a broker made a sale of grapefruit on behalf of respondent. The original terms of sale were not complied with on account of alleged decay in the grapefruit. Thereafter the complainant submitted a compromise offer to respondent which was accepted by respondent dealing directly with the purchaser. The record as submitted showed that the sale was consummated on or before February 25, 1931, but that the complaint was dated December 12, 1931 and received by the Department on December 16, 1931. Complainant not having applied for reparation within nine months after the cause of action accrued the complaint must be dismissed.

S-225, Dec. 8, 1932, Docket 258:

UNITED PACKING CO., FRESNO, CALIF. vs. GRUBER & MINTZER, NEW YORK, N.Y.

It was alleged that a contract was entered into by the complainant and respondent for the sale and purchase of three cars of US-1 Table, girdled, seedless grapes, 80¢ per lug f.o.b. cash shipping point; that the three cars were inspected at shipping point and graded US-1 Table; that respondent accepted one car but rejected the other two; that respondent mailed complainant its check for the purchase price of the three cars but stopped payment thereon; that complainant was forced to find another purchaser for the two cars rejected and caused them to be sold for respondent's account on the auction at New York City. Respondent admitted the allegations made by the complainant as to the terms of the contract, as to the acceptance of one car and the rejection of the other two, and as to stopping payment on the check, but alleged that the grapes shipped were not as represented in that they were not US-1 Table, girdled, seedless grapes.

The sale was entered into by telegrams between the complainant and the broker. In previous decisions under the Act the Secretary has held that the contract may best be proven by consideration of all telegrams relating thereto rather than by any certain telegrams (PACA Docket 220 - F. C. Nelson vs. Levinson Fruit Co.). Following this rule in this case and considering the telegrams as a whole it clearly appears that the contract was for three cars of US-1 Table, girdled, large, seedless grapes. In its answer respondent averred that the stock was not US-1 Table, girdled grapes. At the hearing and in the brief the respondent's main contention was that the grapes were not large. Complainant objected to the setting up by the respondent of a defense not incorporated in the pleading. The general rule in the courts is that a variance between the pleading and the proof is fatal, although the State of New York does not wholly agree with the general rule. The Secretary deemed it inadvisable to discuss the technical rules in the matter as the primary purpose in this case was to ascertain the facts and held that if the grapes were not large, the word large being a part of the contract, the respondent was entitled to the benefits of such defense.

The three cars were inspected at shipping point and certified as US-1. They were also inspected at destination and these inspections showed the grapes in the car which was accepted by the respondent as being "mostly medium, many small, few large." Of the other two cars the grapes in one were certified as "small to large mostly medium," and in the other as "mostly range from large to small, mostly medium." It would appear, therefore, that the grapes did not comply with the contract in that they were not large.

Since one car was accepted by the respondent the complainant is entitled to purchase price of that car since respondent had full opportunity for inspection before acceptance and such inspection would have disclosed the fact that the grapes did not comply with the contract. Since the consideration of this contract was divisible inasmuch as each car was accompanied by separate draft and the contract was divided into carload lots it is not an entire contract, but a divisible one, and the respondent by accepting the first car did not accept the remainder. Since the grapes in those cars did not comply with the contract in that they were not large, the respondent did not reject them without reasonable cause.

Reparation award was issued in the amount of the purchase price of the car accepted, $806.40, plus interest.

S-240. Jan. 4, 1933, Docket 500.

DELAWARE DISTRIBUTING COMPANY, BRIDGEVILLE, DELAWARE, vs. ROSENTHAL BROS., DETROIT, MICHIGAN.

At the hearing the only evidence on behalf of the complainant was a deposition to which the respondent objected on the ground that the Secretary's order for the taking of the deposition called for it to be taken on July 11, whereas it was taken on July 18. The respondent contended that because of this the deposition should not be received, and moved that it be excluded, which motion was granted by the examiner. No other testimony being offered in support of the complainant's case, respondent moved for its dismissal. The examiner declined to rule on the motion at the time of hearing, and the right was reserved for the respondent to file a formal motion for dismissal with the Secretary. This was done; on reaching a decision the Secretary outlined various ways in which parties seeking redress before him might establish their cases, and held that in this case there was no evidence before him; that the complainant had had his day in court to establish his case, and the complaint should be dismissed.

S-246. Jan. 5, 1933. Docket 155:

HALL & STAPLETON, BAY MINETTE, ALA. vs. BAGGERMAN BROS. FRUIT, PRODUCE & KRAUT CO., ST. LOUIS, MO.

Through a broker who acted as agent for both complainant and respondent, complainant alleged that it sold to respondent one carload of Irish potatoes at an agreed price of $1.10 per cwt. f.o.b. Bay Minette, Ala. totaling $275.00 for the car; that upon arrival in St. Louis car was inspected and rejected by respondent; that complainant was thereupon compelled to resell the potatoes which resale netted the sum of $157.00 and that complainant suffered damages in an amount representing the difference between the original price of the car and the resale price, amounting to $118.00 which sum complainant asked as reparation.

Respondent contended that the potatoes were to be as follows:

"One (1) car U. S. #1 Triumphs @ $1.10 per cwt. f.o.b. Alabama. Good clean stock, 1-7/8 inches and up" and that upon arrival inspection showed car contained excessive decay and was slightly under US-1 grade because of the decay. However, the inspection was made at 1:15 p.m. on June 15th and the potatoes were shipped on June 11th f.o.b. Bay Minette. The certificate therefore indicated that the potatoes were US-1 at point of shipment which must govern since this was an f.o.b. shipping point contract.

Respondent further claimed that the broker's charges of $20.00should be deducted from the amount claimed by the complainant as the complainant would have had to pay the broker this sum had the potatoes been accepted. The complainant did not dispute this claim and the Secretary ruled that this should be deducted from the amount claimed by the complainant. The Secretary held that the potatoes were rejected without reasonable cause in that they were US-1 at f.o.b. shipping point and issued a reparation award in favor of complainant in the amount of $98.00 which is the difference between the amount asked by complainant less the $20.00 which would have been paid for brokerage had the car been accepted.

S-266. Jan. 11, 1933, Docket 325:

MEDFORD FRUIT CO., INC., MEDFORD, ORE., vs. WESTERN FRUIT & PRODUCE CO. CHICAGO, ILL.

Complainant alleged that it consigned to respondent ten cars of Bartlett pears to be sold for complainant's account; that the respondent made a guarantee of $1.00 per box for the extra fancy pears and 75¢ per box for the fancy pears, f.o.b. shipping point; that after arrival in Chicago the respondent sold the pears for prices which netted the complainant the sum of $4,352.25, plus $581.62 average, which sum should be added to the amount stated immediately prior to it; that thereafter the respondent paid to the complainant the sums of $3,915.50 and $443.77, leaving a balance of $574.60 unpaid, which sum the complainant requested as reparation.

No answer was filed by the respondent. At the hearing a deposition of a witness for the complainant was offered. However, it was discovered that the deposition was taken 5 months after the date ordered and respondent entered objection that the deposition was taken on a day different from that called for in the original notice and authorization. This objection was upheld by the Secretary. No other evidence having been submitted on behalf of the complainant, and the record being barren of any testimony in support of complainant, the Secretary dismissed the case.

S-276. Jan. 24, 1933, Docket 380:

CONSOLIDATED BROKERAGE CO., BLUEFIELD, W. VA. vs PRICE PLANT CO., CRYSTAL CITY, TEXAS.

Complainant wired respondent for the lowest price on Commercial Yellow onions in Saxolin bags but did not request a shipment thereof and alleged that on the following day respondent wired that it was shipping a car containing 535 sacks of Yellow onions in 50 lb. Saxolin sacks to sell at 65¢ per sack, f.o.b. shipping point; that the onions were to be sold for respondent's account upon a brokerage basis; that due to the condition of the onions complainant was only able to get $107.50 for the sale thereof; that as car was shipped freight collect complainant paid freight in the amount of $264.82; that complainant was damaged in the amount of $157.32, being the difference between the freight charges of $264.82 and $107.50.

Respondent filed counter-claim against complainant in the sum of $347.75, alleging that complainant made false and misleading statements regarding the condition and disposition of the onions.

While complainant stated that it did not order the onions but merely asked for prices, both complainant and respondent recognized the fact that the onions were handled on consignment. From the record it appeared that complainant had sold the onions to three different jobbers before arrival of the car and immediately upon arrival wired respondent to that effect, but that unloading was delayed a day or two for the purpose of having some purchasers obtain their produce direct from the car. Upon unloading the car the three jobbers to whom the onions had been sold discovered that the produce was badly deteriorated and two of the jobbers rejected their portions. The complainant immediately wired respondent to this effect and respondent gave no directions or suggestions as to the disposition of or salvaging of the commodity until a month later, when upon instructions from respondent complainant disposed of the rejected portion of the onions. Complainant made a sight draft on the respondent in the amount of $157.32, the difference between the freight charges and the amount received from the resale of the onions, which respondent did not accept or pay.

The Secretary held that complainant, in good faith, advised respondent that the car was being unloaded, although in fact this was not commenced until two days later; that it advised respondent as to the condition of the onions as fast as that condition could be determined; that respondent failed to prove, and the record did not support any intent to defraud on part of complainant; that respondent failed truly and correctly to account promptly in the transaction. Reparation was awarded complainant in the amount of $157.32 and respondent's counter-complaint was dismissed.

S-297, Feb. 23, 1933, Docket #115.

EDWIN W. WEIL, NEW YORK, N. Y. vs THOMAS S. HERBERT, CROZET, VA.

Complainant alleged that a contract was entered into with respondent whereby respondent was to make future delivery of a block estimated as 5 cars of 160 barrels of Winesap apples, U.S. Utility Grade, sizes 2½ inches and up, at the price of $3.75 per barrel f.o.b. Crozet, Va.; that respondent failed to deliver in accordance with the terms of the contract, and complainant was damaged in the amount of $311.70, being the difference between the contract price and the price paid for apples on the open market to replace those which should have been delivered by respondent.

The contract read: "Quantity: Block estimated five cars each of 160 barrels." Respondent contended that the parties had in mind apples to be harvested and obtainable in the immediate territory of Crozet, Va.; that both parties recognized the uncertainty of a crop and therefore provided in the contract for an estimated delivery of five carloads. Immediately following execution of the contract respondent contracted with growers in the vicinity for delivery to him, at his warehouse, of an amply sufficient amount of apples to enable him to fulfill his contract with complainant but due to unusual drought conditions and excessive and unusual worm damage to maturing apples he was only able to secure from such growers a small portion of U.S. Utility Winesaps, sizes 2½ inches and up; that he notified complainant in November of his inability to secure the apples called for in the contract in the Crozet, Va. territory and that due to the causes stated he would be unable to make delivery.

Complainant contended that respondent was contracted with, not as a grower, but as a shipper; that the contract called for delivery of 800 barrels of apples and respondent should have gone into the market and purchased apples with which to make delivery under such contract.

The written contract was not definite and complete in itself but it seemed that the parties must have had reference to apples obtainable by respondent in a limited territory. Had the respondent been absolutely bound to deliver barrels of U. S. Utility Winesaps, there would have been no occasion for the words "Block estimated give cars each, 160 barrels."

The Secretary held that the facts and circumstances of the record failed to show that respondent's failure to deliver was not without reasonable cause and dismissed the case.

S-313, Feb. 25, 1933, Docket 187: (Hearing)

H. A. SPILMAN, WASHINGTON, D. C. vs. MURPHY FRUIT CO., OF NEW YORK, INC., NEW YORK, N. Y.

Complainant, on behalf of the Department of Agriculture, alleged that during the period beginning May 20 through May 27, 1931, W. D. Horne of Canal Point, Florida, relying on representations made to him by Joseph A. Trombetta that he was an agent of the respondent, sold 17 carloads of tomatoes to the respondent; that respondent accepted delivery of the cars but failed and refused to pay the purchase price thereon; that respondent requested the Central Hanover Bank and Trust Co. to hold the drafts drawn for the tomatoes until arrival of the cars, when in truth and in fact respondent well knew that part of the cars had arrived; that the said false and misleading statements and representations to the bank were made for a fraudulent purpose in that respondent knew that the bank was under obligation to report to its correspondent bank in Florida, and through it to the shipper, respondent's failure to honor the drafts upon presentation; that on account of such misrepresentations by the respondent through the bank as to the disposition of a part of the cars of tomatoes, the shipper was thereby prevented from diverting or selling the remaining cars to some one else; that respondent persisted in its refusal to account to Horne for the true value and invoice prices of the 17 cars of tomatoes until July 15, 1931, on which date, after requiring Horne to sign a formal release waiving all claims against respondent in the premises, as a condition precedent to payment by respondent of any sum whatsoever, paid Horne the sum of $7,660.76, being $1,911.63 less than the agreed invoice price of the 17 cars of tomatoes at the time of purchase and shipment thereof; and that the facts in the case constituted a flagrant violation of the Perishable Agricultural Commodities Act, 1930.

The evidence brought out the fact that the respondent through Mark S. Yeckes, who was the President of respondent corporation, entered into an agreement with Joseph Trombetta to handle a large number of cars of tomatoes to be shipped to New York "for joint account and we were to divide the profits and losses equally." Yeckes knew from previous dealings with Trombetta, as well as during the negotiations for the handling of the tomatoes involved in this case, that Trombetta was not a grower of tomatoes and would necessarily have to obtain the tomatoes through others. Whether it be considered a joint account or a partnership arrangement, it was clear that Trombetta was the agent of the respondent by virtue of this arrangement for the handling and paying for the cars of tomatoes now under consideration. The respondent's position, therefore, which it at one time took through its president, that it would not recoznize W. D. Horne was untenable. Furthermore, when the sight drafts were drawn on respondent by Horne the respondent did not claim that Horne was a stranger to the proceeding but asked the bank to hold the drafts awaiting arrival of the cars. Respondent remitted absolutely nothing to Horne, or anyone else, until July 15, 1931, or a month and one-half after the cars had arrived and had been delivered to the respondent. Had respondent refused to pay the drafts when presented, the shipper would have, of course, received notice and could have protected himself on a large part of the cars by reconsigning them to someone else.

Respondent's counsel urged that the acceptance by the shipper of $7,660.76 and the general release executed by him on July 15, 1931, precluded the Secretary of Agriculture from taking any adverse action against the respondent in the case. The Secretary held that irrespective of whether such position would be correct or not in a case involving purely reparation, it could not have the effect of wiping out a violation of a statute from the standpoint of disciplinary action which occurred more than a month before the release was executed; that the respondent for a fraudulent purpose made false and misleading statements concerning the disposition of the tomatoes; that the facts shown by the record proved a flagrant violation of the Perishable Agricultural Commodities Act and such a wanton disregard of the rights of the shipper and the duty owed to him, that no action short of revocation of the respondent's license could be regarded as adequate. The Secretary revoked license No. 17947 issued to The Murphy Fruit Co. of New York, Inc., the officers of which were Mark S. Yeckes, Harry Yeckes, Wm. J. Kunkel and Lester E. Geller.

S-348, April 11, 1933, Docket 750: (S. P.)

A. W. COLWELL & CO., CLINTON, N. C. vs. CHESTER PRODUCE CO., CHESTER, PA.

Complainant shipped to respondent by Railway Express Agency from Clinton, N. C. to Chester, Pa., 14 crates of strawberries and 42 hampers of peas. Upon arrival of the strawberries and peas at Chester, respondent accepted same and sold them for the account of the complainant. Complainant alleged that respondent refused to remit the net proceeds thereof and owed the complainant $57.18.

The account sales rendered by respondent showed the net proceeds due complainant to be $57.18. Respondent stated in substance that due to his financial condition he had been unable to make the remittance to the shipper. The Secretary held that this was not a legal defense and awarded reparation in favor of the complainant in the sum of $57.18, with interest.

S-378, May 6, 1933, Docket 771: (S. P.)

ANNIE S. KRUEGER, STUART, FLA., vs ACME FRUIT CO., FT. PIERCE, FLA.

During the winter season of 1931-32 the complainant, by contract in writing, sold to respondent 2351 boxes of oranges and grapefruit at a price of $1.00 per box at her grove. The complainant alleged that there was due and owing from respondent on account of failure of the latter to pay for the above-mentioned oranges and grapefruit the sum of $1233; that respondent had this fruit picked and hauled to its packing house at White City, Florida, and shipped it from that place to New York City in interstate commerce.

In the contract referred to in the complaint, the complainant and respondent agreed that for the years of 1928-29 to 1932-33, the entire crops produced in complainant's grove, which was described in detail, were to be sold to the respondent at $1. per field crate upon the trees. In a statement attached to the complaint the number of boxes and the price per box and the payments are all itemized giving the dates, and the balance was shown for the season 1931-32 to be $1233.00.

The evidence disclosed that there were negotiations between the parties with a view to reducing the price or at least the liability of the respondent by entering into an oral agreement due to the depressed prices for citrus fruit which would have reduced the liability to $647 and this amount was admitted to be due by respondent to the complainant. Respondent also stated that other similar contracts were so modified. In fact the respondent in its answer apparently took the position that the written contract was modified but the complainant throughout denied that there was any modification of the original written contract.

The Secretary held that it was incumbent upon the respondent to establish by a fair preponderance of the testimony that the written contract was modified as claimed, which it failed to do. Since the complainant insisted upon standing upon the terms of the written contract and the respondent did not prove that there was any oral contract in lieu of the written contract reducing the liability, reparation should be awarded in the sum claimed by the complainant, which was based on the written contract, namely $1233 with interest.

S-382, May 9, 1933, Docket 567: (Hearing)

UNITED FRUIT STORES, INC., PROVIDENCE, R. I. vs. CAPITOL FRUIT CO., TAMPA, FLA.

Respondent sold to complainant one carload of bulk oranges at the agreed price of $1 per field box f.o.b. Florence Villa, Fla. Upon arrival of the oranges at destination complainant made an inspection thereof and refused to accept the car, claiming that an excessive percentage of the oranges were affected by Stem End and Blue Mold Rots, and on that account did not comply with sale specifications; that thereafter complainant was obliged to buy oranges to take the place of the shipment above described and thereby suffered damages in the sum of $270, being the difference between the purchase price and the amount paid for such replacement lot.

Following an exchange of telegrams with the respondent, the broker issued a standard memorandum of sale describing the oranges as: "One car bulk oranges 360 field boxes bulk oranges all 324s, half each first choice grades, partly stamped, not over 25% Russets @ $1 f.o.b. per field box Florenceville, Fla. 50% U. S. #1. 50% U. S. Choice." The car arrived in Providence on Feb. 2 and Federal inspection that morning indicated the lot to contain an "average of 9% decay, mostly Stem End Rot, various stages, mostly in the form of large spots." A second Federal inspection the following day showed an average of 10% decay. Complainant refused to accept the shipment.

The standard memorandum of sale showed the contract called for "f.o.b. shipping point" and stated that "unless otherwise stated herein, this sale is made in contemplation of and subject to the Standard Rules and Definitions of trade terms printed on the back hereof". Rule 11 appearing on the back of such memorandum read: "'F.O.B. Sales or Quotations' means that the commodity quoted or sold is to be placed free on board the car, or at ship side at shipping point, in suitable shipping condition and that the buyer assumes all risks of damage in transit not caused by the shipper whether there is a bill of lading to the order of the shipper or not."

No Federal inspection was made at shipping point. However, the showing of an average of 9% of the oranges affected by Stem End Rot upon arrival on February 2 and an average of 10% so affected on February 3, together with a showing that approximately 25% of the stock was found to be soft and slightly shrivelled indicated that the fruit was not in suitable shipping condition when delivered to the carrier at shipping point. (Dkt. 32, S-177; Dkt. 319, S-196) Stem End Rot is a fungus disease that originates in the grove. The spores are present on the branches of the trees and fruit stems. It is impossible to distinguish and cull out sound fruit that may be infected and later develop Stem End Rot.

The measure of damages for breach of warranty of quality is generally the difference between the value of the commodity actually furnished the buyer and the value it would have had if it had been of the quality as warranted. Since purchase was f.o.b. Florida shipping point it appeared that there was no competent evidence from which could be determined the difference in the market value of the oranges as actually delivered at shipping point and the market value thereof if they had been as warranted. Even if the sale price of $1 per field box was accepted as evidence of the market value of the oranges as warranted there was no evidence as to what the market value was of the oranges actually delivered. The amount of complainant's damages could not therefore be determined.

The Secretary held therefore that at the time of loading said oranges at shipping point they were not in suitable shipping condition to be transported to destination without undergoing abnormal deterioration; that notwithstanding the shipper's failure to furnish oranges in compliance with sale specifications complainant's proof of damages was insufficient to support a reparation order other than one for nominal damages. Reparation was awarded in the amount of $1.00.

S-395, May 15, 1933, Docket 407: (S. P.)

HENRY C. HOLLMANN PRODUCE CO., ST. LOUIS, MO., vs BRYANT BROTHERS, HUMBOLDT, TENN.

Respondent sold to complainant a carload of tomatoes at the agreed price of $1.10 per lug f.o.b. shipping point. The tomatoes were inspected at shipping point. Complainant alleged that they were also inspected at St. Louis upon their arrival there by a representative of the Agricultural Exchange, who graded them U.S. No. 1; that at Boston, Mass. where the tomatoes had been resold by complainant Federal inspection showed them to grade 80% U.S. No. 1, whereupon the car was rejected by the Boston buyer showing a loss to complainant of $609.48.

Following telephone negotiations between the parties the respondent wired complainant that there was being diverted to the latter a car of tomatoes which graded U. S. No. 1. On the same day complainant wired respondent, "ALRIGHT LET CAR COME."

Federal shipping point inspection showed the shipment to contain "an average of 20% defects consisting mostly of puffs, catface and growth cracks" and that "Stock fails to grade U. S. No. 1 on account of defects noted above, but is 80% of U. S. No. 1 quality." Respondent saw about one-third of the car loaded at Trenton at which time he asked the inspector if he thought the car was going to grade U. S. No. 1. The inspector informed him that up to that time the car would grade U. S. No. 1. Respondent bought the car, containing 630 lugs of green wrapped tomatoes, from Ed. Cole. The respondent was busy about other matters and instructed Mr. Cole to keep the car in grade.

Upon arrival of the car at St. Louis it was inspected by a representative of the Agricultural Exchange. His inspection showed the tomatoes to have been fairly uniform in size, stock mature, generally firm and smooth; 90 to 95% mature green, remainder turning; 5% scars, no decay and under "remarks" stated: "Stock mature, smooth, firm and load in good condition and will grade strictly U. S. No. 1."

The car was bought f.o.b. shipping point for delivery at St. Louis and Federal shipping point inspection was taken as prima facie evidence of the facts therein stated, and, while not conclusive, the evidence of grade as indicated by the inspections at St. Louis was insufficient to overthrow that contained in the shipping point certificate.

The record showed that the complainant originally resold the car for $841.05; that the amount actually received by him on resale after rejection of the car was $231.57. The complainant claimed damages of $609.48, the difference between the amount for which the car was originally resold and the amount actually received by it. This, however, was held not to be the proper measure of the complainant's damages. The original resale of the car by the complainant contemplated transportation of the tomatoes from St. Louis to Boston, and delivery at the latter point about five days thereafter. The shipper could not be held liable for the loss suffered by the complainant from the original resale price under such conditions. The proper measure of complainant's damages was the excess, if any, of the market value at the time and place of delivery of a car of tomatoes of the grade purchased, i. e. U.S. No. 1, over a car of the grade actually delivered, i. e. 80% U.S. No. 1. The complainant was advised as to the proper measure of its damages and requested to submit evidence of its loss on this basis. It failed, however, to submit the evidence requested and only nominal damages in the amount of $1.00 was awarded.

S-398, May 17, 1933, Docket 476:

FOX CHASE FARMS, INC., TOWANDA, PA., vs. SIMENSKY & LEVY, BROOKLYN, N.Y.

Complainant alleged that it sold to respondent, through a broker acting as agent for both parties, one carload of potatoes at 75¢ per hundredweight, or the total sale price of $270.00, delivered at Wallabout Station, Brooklyn, N. Y.; that the potatoes were shipped in car MDT 18501 in compliance with said contract but upon arrival in Brooklyn respondent rejected same and complainant was compelled to resell the potatoes for respondent's account, which resale netted complainant the sum of $234.00 less $10.20 storage charges and $9.80 telephone and wire charges, or a net of $214.00; that on account of said respondent's rejection complainant was damaged in the sum of $56.00, the difference between the amount for which the potatoes were sold to the respondent and the amount realized upon resale plus storage, telephone and wire charges.

The record indicated that under date of January 18, 1932 the complainant and respondent entered into a contract through a broker for the sale of twelve or fifteen cars of U. S. No. 1 potatoes at 95¢ per cwt. in 100-pound sacks delivered to the New York Dock Co., Brooklyn, N. Y., the shipments to be scattered and inspection to be made at New York. Under date of February 2, 1932 complainant and respondent, through the same broker, entered into a contract for the car of potatoes in question at 75¢ per hundred delivered.

Two cars of potatoes were shipped under the contract of January 18, which Federal inspection showed were not U. S. No. 1 and the parties then entered into negotiations, in view of the fact that the potatoes had already been shipped, finally arriving at 75¢ per cwt. or a discount of 20¢ per hundred. Another car of potatoes was shipped, which potatoes also were not U. S. No. 1 as shown by the Federal inspection certificate, and that car was finally accepted at 75¢ per cwt. by the respondent. Respondent stated, and it was not denied, that he ordered U. S. No. 1 potatoes for hospital trade and while he did accept three of the carloads of potatoes of a lower grade than called for in the contract, he lost money on all three of the cars as well as losing the good will of his customers. The evidence showed that none of the four cars conformed to the terms of the original contract.

The complainant contended that the respondent did accept three cars of the potatoes and that the fourth car was similar in grade to the other three, and the fourth car should have been accepted by the respondent at 75¢ per hundred. The evidence disclosed that the contract for U. S. No. 1 potatoes had been modified and that the respondent had agreed to accept potatoes of a lower grade at 75¢ per hundred delivered on the fourth car; furthermore, that evidence indicated that the respondent released the complainant from the terms of the original contract and after negotiations entered into a new contract for the fourth car at 75¢ per cwt. delivered, which was a lower price than called for in the original contract.

The Secretary held that in view of the above it appeared evident that respondent's rejection of the fourth car was without reasonable cause and awarded reparation in the amount of $36.00, with interest, which was the difference between the original price of the car and sum received upon resale. The claim of the complainant for $20.00 representing storage, telephone, and telegraph charges was disallowed.

S-414 and 414-A and 414-B.

THOMAS-MORRIS PRODUCE CO., INC., SAN BENITO, TEXAS, vs. SAMUEL SCHWARTZ FRUIT CO., INC., NEW YORK, N. Y.

Violation charged: Rejection.
Principal points involved: Whether tomatoes were of semi-globe or of flat type; whether respondent's belief that tomatoes were of a flat variety constituted reasonable cause for rejection.
Order: Case dismissed.

Outline of Facts

This case involved a joint account agreement covering 100 to 150 carloads of tomatoes, four of which were shipped by complainant and three were rejected by respondent. Cars were resold at a loss of $1611.48 and complainant claimed reparation from respondent in the amount of one-half this loss. Respondent claimed that the tomatoes were to be of the semi-globe variety and that no flat variety was to be shipped at any time; that the cars actually shipped contained tomatoes of flat variety and respondent was therefore justified in rejecting them.

It appears that the Dennis Brokerage Co. acting as agent for both parties wrote certain letters to the complainant which were submitted to and approved by the respondent and that these letters so modified the original contract as to permit inclusion of tomatoes of a flat-type or variety provided that tomatoes of that description were being included in shipments by others and provided further that respondent should be notified by complainant at the time of shipment that the cars contained flat type tomatoes. The cars in question contained tomatoes of a semi-globe type which while having a flat appearance could not be classed as flat type tomatoes. Nevertheless the inspector at New York City expressed the opinion that the tomatoes in these cars were of a flat variety and respondent therefore was justified in believing complainant had not made delivery in accordance with the contract and that the rejection of the tomatoes was not without reasonable cause.

Rulings included in Decision

1. Texas tomatoes of the semi-globe type can not be classed as a flat type tomato. The evidence showed that the tomatoes in these cars were semi-globe and not the flat type; the complainant therefore was not required to give any notice as to tomatoes of a semi-globe type.

2. The receiver who has a Government inspection at destination referring to tomatoes as being of a flat variety has reasonable cause for rejection if his contract specifies that flat variety shall not be shipped without due notice to him.

S-422, May 25, 1933, Docket 829: (S.P.)

JOSEPH BECKER CO., DETROIT, MICH. v. UNITED BROKERS CO., PORTLAND, ORE.

Complainant alleged that respondent by contract in writing consigned to the complainant one carload of lettuce to be sold for respondent's account; that the lettuce was diverted from Chicago to Detroit and that there was due and owing complainant from respondent a deficit in the sum of $413.31.

Respondent answered, "there was shipped to ourselves, the United Brokers Co., at Chicago, Ill., PFE-21236 containing 82 crates of four dozen size, and 192 crates of five dozen size lettuce, which lettuce had been consigned to the United Brokers Co. by the Co-Operative Lettuce & Cauliflower Association, of Troutdale, Ore;" that upon arrival of the car at Chicago, being unable to effect a satisfactory sale, respondent wired complainant July 16, 1932: "HAVE CAR USONE TROUTDALE LETTUCE 82 FOURS 192 FIVES DUE CHICAGO WOULD APPRECIATE ADVISING QUICKLY PROSPECTS YOUR MARKET IF DIVERTED TODAY WOULD ARRIVE MONDY TUESDAY PFE 21236," to which complainant replied: "CALIFORNIS LETTUCE SELLING OUR MARKET $3 to $3.50 IF YOURS GOOD QUALITY SHOULD BRING GOOD PRICE CAN HANDLE TO ADVANTAGE;" that car was diverted to Detroit and arrived early on the morning of July 19; that at 8:20 a.m. the next day complainant wired respondent: "NO OREGON LETTUCE HERE GOOD WASHINGTON AND CALIFORNIA LETTUCE $3.25 $3.50 GOOD MOVEMENT IF YOURS GOOD QUALITY SEE NO REASON WHY SHOULD NOT BRING THE PRICE WIRE CAR NUMBER MICHIGAN CENTRAL DELIVERY:" that the car arrived in Detroit that morning but complainant failed to advise respondent of the arrival, or the result of its inspection, or the condition of their market, or what they were doing, until 14 days later, when respondent wired complainant for a report on the sale of the car and complainant answered: "TO DATE SOLD TWO AT $3 FOUR $2.75 NINE $2.50 TWENTY SIX $2 THREE $1.75 SIX $1.25 FORTY SIX $1. FIVE 80¢ FIVE 40¢ IMPOSSIBLE GET ANY MOVEMENT ACCOUNT OUR MARKET GLUTTED THIS QUALITY LETTUCE JUST HAVE KEEP PLUGGING AND CLEAN UP SOON AS POSSIBLE." Respondent also alleged that the loss was due to the fact that the buyers in Detroit were prejudiced against Oregon lettuce, which fact complainant must have known when soliciting

consignments having been operating in that market for several years. In a letter from complainant to respondent dated August 12, 1932, the former stated in part "***the real reason for our not being able to get a movement or secure any kind of a price for it was the fact that it was Oregon lettuce.***"

Respondent further alleged that complainant's taking fourteen days to sell slightly more than one-third of the car of lettuce, and its failure to give any advice as to the arrival of the car on the market before breaking and starting to sell, constituted a violation of Section 2 of the Act, and instead of owing the complainant a deficit in the sum of $413.31 less than freight charges realized, complainant should account on the basis of the market prices quoted in the telegram less the $68.00 charged for demurrage and $53.30 charged for extra icing, which under no circumstances or conditions should have been necessary in a market the size of Detroit, as this carload of lettuce should have been cleaned up within 48 hours after arrival.

The evidence showed that the complainant rendered an itemized statement to the respondent showing in detail prices at which the lettuce was sold and the expenses in connection therewith. The evidence also showed that the advice as to the market concerning lettuce was substantially correct at the time the complainant advised the respondent. The market declined materially about the time the lettuce was received by complainant; also the market for lettuce at other eastern points at this time greatly declined. The evidence indicated from the market report submitted that during the time this lettuce was being sold by the complainant, the market price was obtained for this Oregon lettuce, which was materially lower than the prices which were being paid for California and Washington lettuce. The early sales brought good prices compared with the later sales, and the explanation of the complainant for this was the fact that the prices were comparatively high when the car arrived and began to drop steadily, in addition to the fact that he could not make a second sale to any customer. The lettuce, of course, deteriorated to some extent the longer it was held.

It was true that the complainant should have advised the respondent of the difficultues encountered, but these were not known until after the car had been accepted and part of the lettuce was sold. Further, the price for lettuce at other eastern points had declined to such an extent that there probably would have been additional loss had the lettuce been diverted to some other point. The delay on the part of the complainant in advising the respondent did not seem to have caused the respondent any loss whatsoever. Upon the evidence as a whole, the complainant established that there was a deficit of $413.31.

Reparation was awarded to complainant in the sum of $413.31 with interest.

S-426, June 1, 1933, Docket 459: (Hearing)

SATULOFF BROS., INC., BUFFALO, NEW YORK vs. R. S. NORMAN, MERCEDES, TEXAS.

Complainant sought to recover $50.00 paid to respondent as cost of top icing a carload of beets and a carload of cabbage sold by respondent to complainant f.o.b. shipping point in Texas. Complainant paid the drafts drawn by respondent on these two cars, each of which included $25.00 for top ice claimed to have been supplied by respondent. It was alleged by complainant that neither of the cars showed any evidence of having been top iced. Respondent insisted that top ice was supplied in both cars and that although nothing was said in the contract concerning the matter that it was usual and customary to top ice these vegetables and to bill the buyer for the cost of the same, and that had they not been so protected they would have arrived in an unsalable condition.

The evidence was extremely conflicting but after a full consideration thereof the Secretary found as a matter of fact that respondent did top ice both cars at the time of loading and that the allegations of the complainant were not sustained by the record. Complaint dismissed.

S-490, Sept. 18, 1933, Dockets 713 and 713-A: (Hearing)

E. MEYER FRUIT CO., OMAHA, NEBR., vs. MARSHALL FRUIT CO., MARSHALL, MINN. and COUNTERCOMPLAINT

Violation charged: Failure to deliver
Principal point involved: Proof required as to loss of profits.
Order: Nominal damage of $1.00 awarded.

Outline of Facts

Complainant E. Meyer Fruit Co., through a broker in Omaha, bought from respondent Marshall Fruit Co. one car of onions on a delivered basis. Upon arrival the car was rejected by complainant on the ground that the onions were inferior to that called for in the contract of sale. Complainant claimed damages of $300.00, while respondent in its countercomplaint claimed that because of such rejection it suffered damages of $313.45. The specifications of the contract were "one car small to medium, mostly 1-3/4 to 2" U. S. 1 red onions at $4.25 per cwt. delivered." The inspections made at shipping point and at destination clearly indicated that the car did not size 1-3/4" minimum. In fact, the report of the inspection made at Omaha stated under grade: "U. S. No. 1, 1-1/4" minimum."

In proof of damages, complainant introduced a standard confirmation of sale showing another car purchased one month after the date that the rejected car was purchased and also testified verbally that over the telephone it had sold 150 sacks to retailers and jobbers at $6.00 per sack.

Rulings included in Decision.

1. That the shipment failed to meet the contract specifications as the onions graded 1-1/4" minimum.

2. That there is no evidence to support complainant's contention that the purchase one month after the rejection was a replacement of the car rejected.

3. That under the Uniform Sales Act it has been held that before proof may be made of damages from loss of profits there must be some evidence showing that there was no market value at the point or immediate vicinity where delivery was to be made and that in this case complainant failed to produce evidence which met this requirement of the Act. Furthermore, the evidence does not show with a reasonable certainty that complainant suffered a loss of profits. Only nominal damage therefore was awarded and respondent's counter-complaint was dismissed.

S-491, Sept. 19, 1933, Docket 758: (Hearing)

GILBERT H. PARKER, TAMPA, FLORIDA, vs. CORLEY-POWELL CO., INC., ATLANTA, GA.

Violation charged: Failure to deliver.
Principal points involved: Purchase by sample; special damages.
Order: Damages allowed complainant who was required to pay balance of purchase price to respondent.

Outline of Facts

Complainant purchased from respondent at Atlanta 100 hampers of beans labeled "fancy stringless beans" by sample examined by complainant's truck driver before loading. After sale to customers the beans were returned whereupon they were sorted and it was found that in one-half of the lot one-quarter of the hampers were filled with old beans, vines and grass. The beans returned were resorted and resold but the quantity not sold was placed in cold storage and later dumped.

Rulings included in the Decision

1. That complainant's recovery must be determined by the laws of the State of Georgia where the contract was made.

2. That respondent failed to deliver to complainant a lot of "fancy stringless beans" as specified and later exhibited in two hampers examined.

3. That because of respondent's breach of warranty the complainant is entitled to damages equal to the difference between the market value as warranted and the market value of the quality delivered, also to the cost of truck transportation as special damages since the respondent knew that the truck was being sent for the purpose of transporting this lot, but that complainant is not entitled to reimbursement for storage charges claimed as he should have continued reselling the entire lot, not having rejected the beans.

4. That based on the sales made from the hampers which were returned, complainant is entitled to general damages of $38.50 on the value of the beans and to special damages of $50.00 for the cost of truck transportation. However, since payment of the original purchase price of $175.00 had been withheld, the Secretary ordered that complainant pay respondent $86.50, being the difference between the purchase price and the loss sustained.

S-529, Nov. 8, 1933. Docket 1055: (S. P.)

AMERICAN CRANBERRY EXCHANGE, NEW YORK, N. Y. vs. F. D. PARRISH & BRO. WASHINGTON, D. C.

Violation charged: Failure to account
Principal point involved: Cranberries in storage
Order: Reparation awarded complainant in the sum of $63 with interest.

Outline of Facts

During the period beginning on or about October 26, 1932, and ending on or about February 8, 1933, the complainant had varying quantities of cranberries in storage with the respondent at his place of business. Upon removal of the last of the berries on February 8, 1933, it was discovered that 47 boxes thereof were missing. Of these 47/ boxes 17 were stolen. No arrangement was entered into as to the charges for storage. However, on December 13, 1932 the complainant sent its check in the amount of $10 to the respondent as remuneration for the storage of berries in the respondent's place of business.

Rulings included in Decision

1. Since 17 boxes were stolen from respondent's place of business and respondent was acting as a gratuitous bailee, it was liable for slight care only, and complainant was entitled to an accounting on the remainder of the 47 boxes, or 30. The fair and reasonable value of the boxes of cranberries at the time of the period covered by this transaction was $2.10 per box. Complainant was therefore awarded reparation in the sum of $63 with interest.

S-556, Nov. 29, 1933, Docket 619: (Hearing)

UNIVERSAL FRUIT COMPANY, INC., WENATCHEE, WASH., vs S. T. FISH COMPANY, CHICAGO, Ill.

Violation charged: Failure to account
Principal point involved: Abrogation of original contract upon government condemnation of portion of shipment dependent upon arrangements made between parties.
Order: Reparation awarded complainant in the sum of $9.45.

Outline of Facts

Complainant sold to respondent two carloads of "C" grade Delicious apples on an f.o.b. basis. The respondent accepted and paid for the first load shipped but declined and refused to accept the apples shipped by complainant in the second car for the reason that upon arrival of the car at Chicago 80 boxes of the 756 comprising the carload were condemned by the Government acting under the provisions of the Federal Food and Drug Act. Following arrival of the car respondent wired the broker: "MORE TROUBLE UNITED STATES FOOD DRUG INSPECTION STATION CHICAGO HAVE RECORD FGE 50030 TO INSPECT FOR ARSENIC OF LEAD AND GRADING THEY WILL NOT INSPECT CAR INTACT TRACK WANT INSPECT WHEN UNLOADED UNDER CIRCUMSTANCES DONT PROPOSE BE GOAT PAY DRAFT THEY CONDEMN SAME OR PART ONLY WAY WILL HANDLE HAVE SHIPPER RELEASE US IMMEDIATELY WE UNLOAD IF CAR PASSES INSPECTION SATISFACTORY OTHERWISE HANDLE ACCORDINGLY THIS NOT SATISFACTORY MAKE OTHER DISPOSITION." Complainant answered: "THIS AUTHORITY RAILROAD RELEASE TO YOU CAR FIVE HUNDRED THIRTY ADVISE FINDINGS." The next day the respondent wired complainant: "WILL ONLY HANDLE FGE 50030 AS ADVISED OUR DAYLETTER TWENTYFOURTH IF PASSES WILL FORWARD CHECK OR TAKE UP DRAFT LATER THIS NOT SATISFACTORY MAKE OTHER DISPOSITION***." The same day respondent received the following wire from the broker: "UNIVERSAL RELEASING***."

Respondent sold the 676 boxes of apples, which had passed inspection, at auction on the day following the last exchange of wires, and after deducting freight, commission and other accumulated charges remitted to complainant the net proceeds of such sale in the sum of $39.23, at the same time entering into negotiations for the washing and disposal of the condemned lot of 80 boxes. Subsequent to respondent's original accounting, and in its answer as amended at the hearing, respondent admitted net proceeds on the car to be but $9.45. Additional charges against the shipment not included in the original account sales covering expenditures made by respondent apparently for additional demurrage, relisting, and washing of the condemned apples amounted to $29.78.

Complainant's claim was that respondent sold the portion of the load which passed inspection (676 boxes) without complainant's authority and that respondent's exercise of control and possession of the apples in making such sale amounted to an acceptance of that portion of the car at the original f.o.b. purchase price of 50 cents per box.

Rulings included in Decision

1. Complainant and broker were fully informed by respondent in its telegrams of the situation. Inasmuch as the respondent had specifically stated in its wires to the broker and the complainant that, in case the complainant did not care to have the car handled as proposed by it other disposition should be made thereof, it was held that the respondent on receipt of the wire from the complainant releasing the car was justified in assuming that the complainant was accepting respondent's prior offer to handle the car on the basis outlined in its wire to the broker. In view of the circumstances, it would seem that the only interpretation which could be placed on the wire would be that if the entire car did not pass inspection the respondent would handle such portion as might pass inspection or be available for sale on a commission basis.

2. Complainant requested that it be advised as to the results of the inspection. Although complainant was not advised of the results of such inspection until after the sale at auction had been made, nevertheless it could not be said that respondent's subsequent exercise of control over the shipment incident to the resale thereof at auction amounted to acceptance of such portion of the car as had passed inspection under the original contract. Complainant's release of the car was interpreted as an acceptance of respondent's offer to deal with the shipment as outlined in its wire, and was an abrogation of the original contract of sale.

3. Reparation was awarded complainant in the sum of $9.45, which was the amount of respondent's admission of liability.

S-569, Nov. 29, 1933, Docket 424: (Hearing)

MATHEW MERCURIO, YOUNGSTOWN, OHIO, vs. GROWERS PRODUCE COMPANY, ONANCOCK, VA.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Complainant must prove claim for damages. Speculative damages not allowable.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent failed to deliver a carload of Little Stem Jersey sweet potatoes in accordance with contract terms in that the potatoes tendered were not Jersey sweet potatoes and did not grade U. S. #1. At first complainant claimed damages in the sum of $139.50 but in its formal complaint stated the damages amounted to $310.62.

The contract of sale called for "One (1) car U. S. #1, Little Stem, Jersey Sweet potatoes in branded covered barrels, $1.75 per barrel, Delivered." Government inspection and also an inspection made by the Moorhead Inspection Bureau, Inc. upon arrival of the car at Youngstown showed that the sweet potatoes tendered by respondent failed to meet the specifications of the contract as to grade.

The only evidence presented by complainant that he purchased any sweet potatoes to supply his trade in lieu of the carload of Little Stem Jersey sweet potatoes purchased from respondent and rejected upon arrival was a receipted invoice covering a purchase by complainant of "50 ct. Jersey sweets" at $1.14 per crate. In filing complaint, complainant stated: "We have enclosed an invoice showing the price we paid for fifty crates of sweet potatoes from a pool car, and have figured our damages on the basis of three crates to a barrel."

Rulings included in Decision

1. Failure of respondent to deliver a car of sweet potatoes meeting the contract terms was a violation of the Act.

2. No proof was presented to indicate that even the small quantity of 50 crates which the complainant purchased was Little Stem Jersey sweet potatoes. Furthermore, the price at which a jobbing sale of sweet potatoes in the amount of 50 crates would be made is not comparable to a price for a carload sale of sweet potatoes. Complainant based its claim for loss on a "figured" calculation of an assumed purchase by it of a car containing 558 crates of sweet potatoes. The damages claimed therefore were entirely speculative and not allowable as reparation.

S-577, Dec. 12, 1933, Docket 854: (Hearing)

A. J. TEBBE & SONS, ASHERTON, TEXAS, vs. WEST VIRGINIA BROKERAGE CO., HUNTINGTON, W. VA.

Violation charged: Failure to account.
Principal point involved: Failure to pay purchase price a violation of the Act.
Order: Reparation awarded complainant in the sum of $359.55, with interest.

Outline of Facts

The parties in May, 1932, entered into a contract in writing whereby the respondent agreed to purchase one carload of No. 1 Crystal Wax onions at 85¢ per bag, f.o.b. Texas. The respondent accepted the car and remitted in the sum of $55.39, $50 of which applied against the original cost and $5.39 represented interest from the date of sale to August 19, 1932. An allowance of $25 for brokerage was made leaving a balance due complainant of $359.55.

Ruling included in Decision

1. Respondent failed truly and correctly to account for the carload of onions in violation of the Act and reparation was awarded complainant in the sum of $359.55, with interest.

S-578, Dec. 12, 1933, Docket 848, (Hearing)

H. I. LEWIS CO., FRESNO, CALIF. vs. WEST VIRGINIA BROKERAGE CO., HUNTINGTON, W. VA.

Violation charged: Failure to account.
Principal point involved: Failure to pay after release of car obtained, a violation of the Act.
Order: Reparation awarded complainant in the sum of $450.09, with interest.

Outline of Facts

Complainant in September 1932 sold respondent one carload of mixed table grapes, U. S. No. 1, at a total price of $475.09, f.o.b. shipping point. The records of the railroad company indicated that when the car arrived it was accepted by the respondent after the "advise" billing was changed by complainant to "open" and the car released to respondent. The record further contained a statement by the respondent acknowledging the indebtedness. It was the contention of the respondent at the hearing that he had paid the sum of $35 to Mr. Claud Hook who stated he represented the complainant and that the respondent was therefore entitled to a credit of $35. The respondent was given an opportunity to produce the receipt but failed to substantiate its contention that the $35 was actually paid.

Ruling included in Decision

1. Respondent's failure truly and correctly to account was a violation of the Act and reparation was awarded complainant in the sum of $450.09 with interest.

S-579, December 18, 1933, Docket 495: (S. P.)

R. S. NORMAN, WESLACO, TEXAS, vs. R. L. ROOTS PRODUCE CO., RAYMONDVILLE, TEXAS.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: In f.o.b. purchase buyer assumes responsibility for normal deterioration in transit.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the sale and purchase of one carload of U. S. No. 1 tomatoes consisting of 660 lugs at $2.35 per lug f.o.b. shipping point, or a total of $1551, which were paid for in cash by complainant. Complainant alleged that believing the tomatoes met the specifications of the contract it sold the car to another company for the sum of $1858.17, which company rejected them upon arrival because they were not U. S. No. 1 and complainant was forced to resell at the best price obtainable suffering a loss of $1135.30, being the difference between what the commodity would have been worth had it met the specifications of the contract and the net amount that respondent received for the tomatoes.

The car was originally inspected at shipping point and contained some U. S. No. 2 tomatoes; however, the respondent showed by competent affidavits that the U. S. No. 2 tomatoes were removed from the car after this inspection and replaced with U. S. No. 1 stock obtained from the Botts Produce Co. at Harlingen. These affidavits were supported by the Federal inspection at destination in that the inspection showed that the stock met the quality requirements of U. S. No. 1 grade and failed only on account of the condition.

Ruling included in Decision

1. This was an f.o.b. sale and the purchaser was liable for normal deterioration in transit. The condition as shown by destination inspection indicated normal deterioration and that the car met the terms of the contract.

S-580, Dec. 18, 1933, Docket 1059: (S. P.)

A. O. KOLBERG, McALLEN, TEXAS, vs. TOM AYOOB CO., PITTSBURGH, PA.

Violation charged: Failure to account
Principal point involved: Failure to pay purchase price is a violation of the Act.
Order: Reparation awarded complainant in the sum of $732.70, with interest.

Outline of Facts

A contract was entered into between complainant and respondent whereby respondent agreed to purchase one carload of mixed vegetables to be good quality and pack. Upon arrival of the car respondent accepted the car with the exception of the Savoy cabbage. After some negotiations an allowance of 25¢ per crate was granted on the cabbage. The respondent inspected the car and agreed to the 25¢ allowance on the cabbage and accepted the other commodities without comment. It made no attempt to establish any defense for its failure to pay for the car of vegetables in question.

Ruling included in Decision

1. Respondent's failure to pay for the car was a violation of Section 2 of the Act and reparation was awarded complainant in the sum of $732.70 with interest.

S-588, Jan. 3, 1934 Docket 1241: (S.P.)

C. S. MAYES & SONS, MUSKOGEE, OKLA., vs. A. W. VENIER, OGDENSBURG, N.Y.

Violation charged: Failure to account
Principal point involved: Failure to pay purchase price a violation of the Act.
Order: Reparation awarded complainant in the sum of $729.60 with interest.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of one carload of Aroma strawberries containing 448 crates at $1.85 per crate f.o.b. Monett, Missouri. The respondent paid complainant $100 on account, leaving a balance of $729.60. In a letter to the Department the respondent admitted that the account was long past due and stated that "we do want to pay this account in full as soon as possible."

Ruling included in Decision

1. Respondent admitted complainant was entitled to the reparation sought and therefore reparation was awarded complainant in the sum of $729.60 with interest.

S-594, Jan. 18, 1934, Dockets 584 and 599: (Hearing)

BLOOM-ROSENBLUM-KLEIN CO., YOUNGSTOWN, OHIO, vs. WILLIAM FEAN & CO., INC., COLUMBUS, OHIO and COUNTERCOMPLAINT.

Violations charged: Failure to deliver; failure to account.
Principal points involved: Unauthorized action of broker invalidates possible contract; no evidence for determining disposition of money in dispute.
Order: Complaint and countercomplaint dismissed.

Outline of Facts

Complainant and respondent entered into negotiations through the Tri-State Sales Agency of Pittsburgh, Pa., as broker for the purchase and sale of a carload of strawberries. The wires from the Fean Company to the broker specified "Good Fancy Aromas" and the reply back by the Tri-State Sales Agency stated "Fancy stock". The latter, however, in making its offer to the Bloom Company described the berries as being of U. S. No. 1 quality. It was on this basis that the Bloom Company agreed to purchase the car and the broker thereupon issued a confirmation of sale as follows: "One (1) car U. S. #1 Aromas strawberries in 24 quart labelled crates, $2.25 per crate, delivered."

The Bloom Company made objection that the berries upon arrival were not of the quality and grade called for in the contract. However, they finally accepted the car and sold it after they had demanded an allowance that was refused by the Fean Company, which asked the release of the car in order that it might divert the shipment to another market. The Bloom Co. received and accepted the strawberries on the theory that they would use them to satisfy the requirements of their trade claiming that they could not secure other berries and would maintain an action for any loss resulting from the failure of the berries to measure up to the contract specifications. Thereafter the Bloom Company, by agreement with the Fean Company, which was entered into with the distinct understanding that it should not amount to an accord and satisfaction of any of the claims growing out of the sale and purchase of the berries, paid over to the Fean Company a certain sum of money claimed by the latter, with the exception of $316.55. The Bloom Company claimed that it was entitled to retain this money since the commodity sold for a total of $838.45, when it would have sold for $1155, provided the strawberries had met contract specifications as understood by the Bloom Company. The Fean Company claimed it was entitled to the $316.55 as the balance of the purchase price which the Bloom Company failed to remit.

Rulings included in Decision

1. The Fean Company quoted to the broker "Good Fancy Aromas" and at no time mentioned U. S. grades. Although the U. S. Standards for strawberries do not provide for a Fancy grade, the broker nevertheless confirmed this sale to Bloom Company as U. S. No. 1. All parties to this transaction have been in the produce business for a number of years and are familiar with the various grades and quotations of the various perishable commodities. In numerous decisions under this Act the Secretary has called attention to the fact that where a party quotes No. 1 or No. 2 without any words indicating that U. S. grades are to be taken into consideration there is no basis for determining the quality and condition of the produce on the basis of these grades. Produce that may be termed as "Fancy" in one locality may not be of suitable quality to meet the requirements of U. S. No. 1 grade. The broker in changing the quotation of "Fancy" stock to U. S. No. 1 stock was acting wholly without authority and due to this unauthorized action there was not a meeting of the minds such as is necessary to constitute a contract between the Fean Company and the Bloom Company.

2. The Bloom Company accepted the strawberries regardless of the fact that they did not meet its specifications and there is an implied contract to pay the reasonable value thereof.

3. The record did not contain evidence sufficient to show the reasonable carlot value of the berries as delivered nor was there sufficient evidence for determining the disposition of the $316.55 in dispute.

4. Further, the facts in this case did not indicate a violation of the Perishable Agricultural Commodities Act for which the Secretary might assume jurisdiction and issue an order for the payment of any part of the sum in dispute. There was not a failure to deliver without reasonable cause nor a failure truly and correctly to account as far as the record disclosed. The complaint and countercomplaint were therefore dismissed.

S-600, Jan. 31, 1934, Dockets 967 & 967-A: (Hearing)

BARTLETT PRODUCE CO., WICHITA, KANSAS, vs. PACIFIC FRUIT AND PRODUCE CO., SEATTLE, WASHINGTON, and COUNTERCOMPLAINT.

Violation charged: Failure to deliver; rejection without reasonable cause.
Principal points involved: Federal inspection certificate "prima facie evidence"; if certificate in error regulations provide how appeal inspection may be obtained and error corrected.
Order: Complaint of Bartlett Produce Co. dismissed; in countercomplaint of Pacific Fruit and Produce Co. they were awarded reparation of $101.26 with interest against Bartlett Produce Co.

Outline of Facts

On December 3, 1932 the Pacific Fruit & Produce Co. sold to the Bartlett Produce Company a carload of Gano apples, 2-1/4 inches in diameter or larger, of average color, orchard run, culls out, Colorado No. 1 bulk, at the agreed price of $15 per ton f.o.b. Austin, Colorado. The apples were shipped on December 6 and Federal shipping point inspection showed they conformed strictly to the specifications in the contract of sale. Upon arrival of the car at Wichita on December 10, the Bartlett Produce Co. claimed that the apples did not conform to the specifications of the contract and asked that the draft be reduced $5.00 per ton. The Pacific Fruit & Produce Co. advised the broker of the contents of the Federal-State inspection certificate and asked that a Federal inspector at Wichita be called to inspect the apples. The Bartlett Produce Co. did not call a Federal inspector for the apparent reason that the weather was cold and it would cost about $40 to get an inspector from Kansas City, Missouri, the nearest Federal inspection office, to Wichita, Kansas. The Bartlett Produce Co. alleged failure to deliver and requested damages in the sum of $106.04. The Pacific Fruit & Produce Co. in their countercomplaint charged unlawful rejection and requested damages in the sum of $101.26.

Rulings included in Decision

1. The Bartlett Produce Co. knew, or should have known, that the certificates on the face of them state that they constitute "prima facie evidence" and if the Bartlett Produce Co. thought the shipping point inspector was in error, a Federal inspector should have been requested to examine the apples at destination as suggested by the shipper.

2. The apples were sold f.o.b. Austin, Colo., and other things being equal, the evidence concerning the condition of the apples on December 6, 1932 should receive greater weight than any evidence concerning the condition of the apples on December 10 or later. The complaint of the Bartlett Produce Co. was therefore dismissed.

3. Federal-State inspectors are appointed after careful investigation as to their qualifications. They are believed to be impartial and if one is in error the regulations provide how an appeal inspection may be obtained and the error, if any, corrected. These two cases seem to illustrate the desirability of buyers and sellers giving more weight to such inspection certificates than was given in this case.

4. The Pacific Fruit & Produce Company's complaint alleging damages in the sum of $101.26 and the Federal-State inspection as well as other evidence in the case was sufficient to award damages as reparation against the Bartlett Produce Co. in that amount. Reparation was therefore awarded the Pacific Fruit & Produce Co. in the sum of $101.26 with interest.

S-601, Jan. 29, 1934, Docket 927: (Hearing)

ALTMAN & SWARTZ, BUFFALO, N. Y. vs. RUDIN BROTHERS, INC., ST. LOUIS, MO. and/or ST. LOUIS DISTRIBUTING CO., ST. LOUIS, MO.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: Acceptance after inspection; principal bound by acts of agent.
Order: Case dismissed.

Outline of Facts

On March 19, 1932, complainant purchased from Rudin Brothers, Inc., through its broker, the St. Louis Distributing Co., Inc., one carload of California Imperial Valley lettuce, U. S. No. 1, $2.85 per crate delivered St. Louis, with the special agreement that the broker would inspect and accept the car at St. Louis for the account of the complainant. The St. Louis Distributing Co., Inc. inspected and accepted the car on behalf of the complainant and the latter resold the car to a firm in New York City. Upon arrival of the car in New York, the purchaser in that city advised complainant that the car did not grade U. S. No. 1. Complainant contended that on account of the failure of Rudin Brothers to furnish a car of U. S. No. 1 lettuce as specified in the contract of purchase, it suffered damages in the sum of $298.65, the difference between what the lettuce would have been worth had it been U. S. No. 1 and the market value of the lettuce actually delivered. The St. Louis Distributing Co. acted as a broker in the transaction for which it received a brokerage fee of $20 from the complainant.

Rulings included in the Decision

1. The terms of the contract provided for the broker's acceptance on behalf of the complainant at St. Louis. Complainant agreed to such a provision and the broker inspected and accepted the lettuce. While the representative of the brokerage house contends that they made only a doorway inspection, nevertheless there was ample opportunity for a further personal inspection or an inspection by the Federal Inspection Service at St. Louis.

2. The failure of the broker properly to inspect the lettuce or have it inspected by an authorized inspector fell upon the complainant. There was some discussion in the record as to the fact that Rudin Brothers, Inc. told the broker that it had an inspection certificate showing U. S. No. 1 or that it purchased the car from the original shipper on a U. S. 1 basis. The broker's reliance upon such statement was no defense since it has ample opportunity to inspect and determine for itself the true quality and condition of the lettuce. In other words, if the broker was negligent in its inspection and acceptance of the lettuce at St. Louis, the complainant was bound by such negligence since the broker was its agent. Accordingly, the complaint was dismissed.

S-609, February 6, 1934, Docket 544: (S.P.)

FARLEY FRUIT CO., SALINAS, CALIF. vs. CROP DISTRIBUTORS, INC., NEW YORK, N. Y.

Violation charged: Failure to account.
Principal point involved: Party not bound by unauthorized act of alleged agent.
Order: Case dismissed.

Outline of Facts

Complainant consigned seven carloads of Iceberg lettuce to the respondent based upon an alleged contract signed by J. W. Morris in which complainant in good faith believed that the respondent was to handle this lettuce on a guaranteed basis.

Milo Frank entered into contractual relations with the complainant, the Farley Fruit Co., for the handling of seven cars of lettuce above referred to. Frank represented to the complainant that the cars of lettuce would be handled on a guaranteed basis and attempted to get the respondent, the Crop Distributors, Inc. to agree to so handle the cars of lettuce. The respondent never agreed to do this on the seven cars but did make an accommodation advance on certain cars expecting to retain sufficient proceeds to protect themselves against loss. However, apparently the last one or two cars sold for less than was expected and there was an actual shortage of $140.24. The evidence also showed that J. W. Morris was not authorized by the respondent to execute the contracts of purchase and sale. J. W. Morris stated that he was authorized by Milo Frank to make the contract with the Farley Fruit Co. for the account of the Crop Distributors, Inc. Milo Frank, however, was not authorized to so bind the respondent and of course Frank could not confer such authority upon Morris.

Ruling included in Decision.

1. The complaint based upon an alleged failure to account on a guaranteed basis was dismissed.

S-619, February 14, 1934, Docket 648: (Hearing)

MILLER COOPERATIVE AUCTION, INC., HAMMOND, LA., vs A. JACOB & CO., DETROIT, MICH.

Violation charged: Failure truly and correctly to account.
Principal points involved: Whether cars were consigned or sold; right of respondent to use as a set-off personal indebtedness due from manager of complainant corporation.
Order: Complainant awarded reparation in the sum of $6,699.70, with interest.

Outline of Facts

Complainant claimed that it had sold to respondent certain cars of strawberries for many of which respondent failed to pay and on others made unauthorized deductions in making payment; that respondent justified withholding payment because of transactions between respondent and Lee R. Miller, sales manager for complainant; that Lee R. Miller operating a business in the State of Florida with which complainant had no connection and in connection with this business became indebted to respondent and afterward secured from him a loan of $4,000; that respondent claimed that Lee R. Miller was to consign cars to respondent the proceeds of which respondent was to recoup the money due it; that this transaction was illegal and without the authority of the complainant.

Respondent contended that the cars of strawberries in question were not sold to it but were consigned to be sold on account; that there was no illegal transaction between it and the sales manager of complainant; that Lee R. Miller represented to respondent that he was the owner in his own right of 51% of the capital of the complainant; that Lee R. Miller desired certain cash to distribute among growers of the strawberries in advance; that respondent agreed to advance and did advance to complainant company the sum of $4,000; that there was a balance due respondent previous to this from said Miller in the sum of $1,382.45. The evidence showed that Miller had authority to make arrangements for the disposition of the cars; that he agreed to a consignment transaction between the parties and that the cars were not sold to Jacob but were consigned for sale on account. The evidence also showed that while there was gross negligence on the part of the officers and directors in the conduct of the affairs of the corporation and while the appropriate sales made on the auction were in some instances at least but a sham and a pretence nevertheless respondent was extraordinarily negligent in accepting Miller's word as to his authority to negotiate the loan; that the loan was without the authority of the Board of Directors of the complainant corporation; and that the loan was a personal one to Miller and that neither it nor the deficit on the Florida deal was chargeable to complainant. It was held that respondent should account to complainant on a consignment basis and that there was due complainant $1317.25 by reason of a check outstanding plus the $4000 advanced to Miller and the balance from the Florida deal of $1,382.45 or a total of $6,699.70.

Rulings included in Decision

1. That amounts advanced the manager of a corporation on the statement that he had authority to negotiate such loans when as a matter of fact the loan had not been authorized by the Board of Directors of the corporation must be considered as personal loans.

2. Amounts due personally from the sales manager of a shipping organization can not be used by a receiver as a set-off against amounts due the shipper.

S-622, Feb. 20, 1934, Docket 645: (Hearing)

HARRY THRAILKILL, STEVENSVILLE, MONTANA, vs C. H. ROBINSON CO., MINNEAPOLIS, MINN.

Violation charged: Failure to account.
Principal point involved: Initial complaint must be filed within 9 months of the time the cause of action accrued and must contain sufficient facts to show cause of action under the Act.
Order: Case dismissed.

Outline of Facts

The initial complaint in this case was filed by Harry Thrailkill under date of April 3, 1931 by telegram reading as follows: "ON BEHALF OF BITTER ROOT HEAD LETTUCE GROWERS ASSOCIATION I WISH TO FILE CLAIM AGAINST C H ROBINSON COMPANY OF BUTTE MONTANA MINNEAPOLIS AND ELSEWHERE FOR OVER SIX THOUSAND DOLLARS STOP REPARATION OR SUCH OTHER ACTION AS MAY BE ADVISABLE STOP PLEASE WIRE MY EXPENSE ADVISING PROPER PROCEDURE WHERE TO FILE CLAIM AND IF I SHOULD ENGAGE ATTORNEY OR IF MATTER COULD BE PRESENTED TO UNITED STATES DISTRICT ATTORNEY HERE".

No further complaint was filed until September 30, 1931 when Thrailkill filed a formal complaint which set forth at length the execution of a written contract between complainant and respondent under the terms of which a loan was made by the respondent to the complainant and a certain note, in the amount of $2500, secured by a deed to 120 acres of land was executed by complainant in consideration of which complainant appointed respondent as his agent to "handle as brokers and distributors" all the fruits and vegetables shipped or caused to be shipped by complainant from Ravalli County in the State of Montana during the year 1930.

While the complaint was very indefinite, it may be said there were five distinct violations alleged therein. First - a failure truly and correctly to account promptly for 18 carloads and 2 less than carlots of head lettuce; second - false and misleading statements made to complainant with respect to the condition of the market for certain consignments; third - the making of false and misleading statements to the complainant concerning the mailing of a check for $5600; fourth - the making of false and misleading statements to other persons as to the sale and disposition of the produce and payment therefor; and fifth - that respondent wrongfully sold complainant's land.

It was the contention of respondent that a proper complaint was not filed within the nine months' period and that therefore the Secretary was without jurisdiction to decide the issues herein presented and denied the allegations of the complaint that it failed and neglected to account to complainant for the net proceeds.

Rulings included in Decision

1. The only complaint filed by complainant within nine months from the date the alleged cause of action accrued was the telegram which complainant sent to this Department on April 3, 1931. The cause of action, if any, accrued on September 9, 1930, at which time final accounting was made to complainant by respondent. Formal complaint was not filed until September 30, 1931. Under Section 6(a) of the Act it is necessary to apply within nine months by petition stating briefly the facts. The telegram in question, which must be termed the complaint since it was the only one properly before the Secretary, did not sufficiently set forth the facts surrounding this transaction to properly show a cause of action. It was merely a general statement. It is unnecessary that the complaint made to the Secretary be formal in character, but it is necessary that it contain sufficient facts to show a cause of action under the Act. A letter or telegram may be a sufficient complaint within the meaning of the Act provided that it states sufficient facts to charge a violation of the Act and warrants the serving of such complaint upon the adverse party. Since this telegram did not comply with the requirements of the Act, and the statute of limitations had run against the formal complaint, the case was dismissed.

However, disregarding the fact that the Secretary did not have jurisdiction, he stated that he considered it advisable, due to the peculiar nature of this transaction, that some of the questions presented by the record be discussed, which discussion is briefly set forth below:

As to the failure truly and correctly to account promptly, it appears from the record that the carlots and less than carlots of lettuce moved during the period from July 1 to July 23, 1930 and that an accounting was not made until September 9, 1930. Under the terms of the contract it would have been necessary for the complainant to have disclosed the dates upon which the consignees remitted to the respondent. With this information in the record it would have been possible to determine whether the respondent was negligent in its accounting. The complainant having failed to properly bear the burden of proof, this allegation of his complaint must be dismissed.

The second contention is that the respondent made false and misleading statements concerning the market for said consignments. There is no evidence in this record tending to show that the respondent actually knew the condition of the eastern markets for lettuce of the quality and in the condition that these shipments are shown to have been. It was merely an opinion expressed and is certainly not a violation of the Act in the making of false and misleading statements for a fraudulent purpose. The most that can be said is that poor judgment was exercised by the respondent's employees in their handling of the transactions. Certainly there is nothing fraudulent shown and this must be present if a violation of Section 2, sub-section 4, is properly proven.

The third and fourth alleged violations concern the making of false and misleading statements with respect to the mailing of a check to complainant and the making of false and misleading statements to other parties as to the sale and disposition of the lettuce and payment therefor. While there was considerable testimony tending to show that respondent's agent, Peters, did make false statement to the complainant as to the mailing of a check for $5600, such statements, if made, would not be actionable under this law because the false and misleading statements specified by the Act are limited to those "concerning the condition, quality, quantity or disposition of, or the condition of the market for any perishable agricultural commodity," etc. Obviously a false or misleading statement to the effect that a check had been mailed when in fact this had not been done would not fall within the words of the statute.

The fifth and final allegation is a further claim for reparation arising out of the sale of the land deeded as security for the advances made by the respondent. This is clearly not actionable under the Perishable Agricultural Commodities Act, 1930. No provision thereof covers a situation of this kind. With regard to complainant's claim for $40,000 damages by reason of injury to the complainant's reputation and character in the Bitter Root Valley of Montana, where complainant resides, any such claim would necessarily have to be predicated upon some violation of the Act by the respondent, and as no such violation has been shown it necessarily follows that the claim must be denied.

S-627, Feb. 26, 1934, Docket 439; (Hearing)

A. ZIMMERMAN & COMPANY, PHILADELPHIA, PA. vs. AGRICULTURAL EXCHANGE, PITTSBURGH, PA.

Violation charged: Failure to pay brokerage.
Principal point involved: Insolvency of respondent.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold for respondent on a brokerage basis eight carloads of melons for which complainant should have received $15.00 a car, or $120.00. Later complainant sold for respondent on a brokerage basis four carloads of melons, for which complainant should have received $15 per car, or $60, making a grand total of $180. The first eight cars were shipped from El Centro, Calif. and the other four from Phoenix, Arizona. Complainant alleged that the buyers accepted the cars and that respondent had not paid the brokerage in the sum of $180.

The evidence was conflicting. David Kellerman, testifying for respondent, denied any liability for brokerage on the eight cars shipped from El Centro, but stated that they were sold to L.D.Goldstein direct by respondent. He admitted liability as to the brokerage claimed on the four cars shipped from Phoenix, Arizona, but took the position that Zimmerman owed the respondent some $800.00 due to transactions which occurred prior to the passage of the Perishable Agricultural Commodities Act, 1930.

Ruling included in Decision

1. Records of the Department showed that the respondent had not been engaged in business for a considerable period of time, due to the fact that its license was revoked by the Department. Furthermore, the respondent is hopelessly insolvent and while ordinarily insolvency is not a basis for dismissing a claim for reparation, it was clear that a reparation order would be ineffective. Therefore, even if the facts in this case warranted the issuance of a reparation order, or taking any disciplinary action against the respondent, it would be futile to do so. Considering the record as a whole the case was dismissed.

S-635, March 5, 1934, Docket 1095: (Hearing)

MATHEW MERCURIO, YOUNGSTOWN, OHIO vs E. E. WILLARD, THEODORE, ALABAMA.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: No valid contract.
Order: Case dismissed.

Outline of Facts

Respondent shipped complainant one carload of potatoes. Complainant alleged that upon arrival the potatoes did not meet the terms of the contract due to rot and mechanical injury and that he was damaged in the sum of $125. The alleged contract for the sale of the car was entered into by means of telegrams between the respondent and the broker. A review of these telegrams clearly indicated that the specifications of the alleged contract were never fully agreed upon by the parties, the broker continually specifying "previous specifications". The respondent never did confirm on this basis. It was the contention of the complainant that "previous specifications" meant sound arrival, the respondent believing that it mean an f.o.b. shipping point basis. The memorandum of sale issued by the broker did not reach the respondent until the car was in Youngstown. The record indicated further that this was the first and only car shipped by this respondent to complainant during the season and there was no precedent to determine the "previous specifications" part of the telegram.

Ruling under Decision

1. Under the telegrams set out in the record there was not a valid and binding contract since there was no meeting of the minds and the complaint was dismissed.

S-638, March 5, 1934, Docket 1225; (S.P.)

MONHEIMS WHOLESALE PRODUCE, UNIONTOWN, PA. vs. D. C. McCOTTER CASH CORNER, N. C.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: Complainant waited unreasonable length of time before purchasing another car to replace one respondent failed to deliver.
Order: Complainant awarded nominal damages in the sum of $1.00.

Outline of Facts

Complainant charged that it purchased from respondent, through a broker, three cars of barreled potatoes, U. S. 1 grade to be delivered at Uniontown, Pa. at $2.80 per barrel; that respondent delivered two of the cars but failed to deliver the third car and that complainant suffered a loss of $160.35 due to the necessity of purchasing another car of potatoes to replace the one which respondent failed to deliver. The respondent contended that the three cars were purchased by complainant through J. E. Nelson, a broker, two cars of which were ordered shipped to complainant at Uniontown, Pa. and one car to complainant at Oakland, Md. at $2.80 per barrel delivered Uniontown, Pa. rate of freight and that the potatoes were shipped in accordance with the contract of purchase.

The broker issued two standard confirmations of sale on the same date in connection with this transaction, one of which specified shipment of three cars to complainant at Uniontown, the other calling for the shipment of one car to complainant at Oakland, Md. In view of the fact that the Oakland, Md. car was shipped, accepted and paid for the complainant made no reference to this shipment in its complaint. The evidence disclosed that only two cars were shipped to Uniontown, Pa. instead of three cars and that on June 30 complainant purchased another car of potatoes containing 174 barrels at $3.00 per barrel instead of $2.80 per barrel to replace the car and that in addition to this complainant had to pay $125.55 freight, making total damages of $160.35.

Rulings included in Decision

1. Respondent failed to deliver a car of U. S. No. 1 potatoes at Uniontown, Pa. as called for in the contract of purchase and sale, and such failure to deliver was a violation of the Act.

2 The two cars of potatoes which respondent shipped to Uniontown were received there on or about June 16 and the third car should have been delivered at approximately the same time. Complainant waited until June 30 before purchasing another car of potatoes to replace the one that respondent failed to deliver, which was an unreasonable length of time and therefore nominal damages only were awarded.

S-639, March 7, 1934, Docket 976: (Hearing)

AMERICAN DISTRIBUTORS, INC., EXMORE, VA. vs. A. C. BLAIR CO., CLEVELAND, OHIO.

Violation charged: Failure to account.
Principal point involved: Burden of proof upon complainant.
Order: Case dismissed.

Outline of Facts

Complainant claimed that it sold by telephone to respondent one carload of sweet potatoes and that the car was accepted but that respondent failed to pay the full purchase price.

The record disclosed a very definite dispute as to the agreement whereby this car was shipped to the respondent. It was the contention of complainant that the car was sold over the telephone for certain prices. The respondent's contention was that the complainant had been endeavoring for some time to get the respondent to put this particular brand of sweet potatoes in one-half bushel packages on the Cleveland market and that the telephone conversation in question resulted in an agreement whereby the respondent was to handle this car to determine if the Cleveland market could use this type of sweet potatoes in the particular package. The respondent specifically denied that it agreed to purchase the car at the prices named or at any price.

Upon arrival of the car in Cleveland and inspection thereof, the respondent telephoned complainant and this conversation was also in dispute. The complainant's testimony implied that no objection was made and the produce was accepted. The respondent stated that a call was made on Sunday morning to advise the complainant that the car would not bring the market price due to its condition and that if the complainant desired to divert it to do so but that unless it was diverted within a reasonable time the respondent would handle for complainant's account. The car was not diverted and respondent handled it on consignment sending a check to complainant in the sum of $51.82 to cover the net proceeds. There was an exchange of two telegrams but they did not assist in determining what was actually agreed upon.

Ruling included in Decision

1. Complainant having alleged that there was a contract entered into, the burden of proof fell upon it to prove said contract. The record did not show that the contract had been proven, there being serious doubt as to whether there was an agreement for the purchase of the car entered into in the telephone conversation. There was nothing in writing to show the details of such agreement and the complaint was therefore dismissed.

S-643, March 8, 1934, Docket 1054: (Hearing)

L. A. BLUNCK, INC., NAMPA, IDAHO, vs. C. H. WEAVER & CO., CHICAGO, ILL.

Violation charged: Failure to account.
Principal points involved: Debts or demands in a representative capacity can not be used as a set-off in a transaction where parties are acting individually; an agent to sell may not accept remuneration from two principals whose interests may conflict; respondent not justified in increasing commission rate on carlot track sales without notifying complainant.
Order: Complainant awarded reparation in the sum of $123.11, with interest.

Outline of Facts

Complainant alleged that it consigned to respondent 14 cars of apples to be sold on advance basis of 45¢ per bushel f.o.b.; that respondent accepted the shipments but failed to pay the advances as agreed upon; that the parties entered into a contract whereby respondent allowed complainant $25 per car on all cars of produce consigned to respondent; that 31 cars were so consigned but respondent failed to pay the commission; that in past years and on the first two cars involved in this complaint respondent charged complainant a commission of 5% and that without notice of any change in its selling charge on track sales respondent increased its commission charge to 10% resulting in an overcharge for the making of track sales on 12 cars. Respondent denied complainant's allegations and contended that complainant owed respondent the deficits incurred in the handling of carload shipments prior to those named in the complaint, and also for a loss sustained in connection with a car of apples prior to the transaction set forth in the complaint.

Complainant apparently contended that respondent's agreement to advance 45¢ per bushel amounted to a guarantee that the apples would be sold for a net return of not less than that amount. No evidence was found to support this contention. Complainant contended that a portion of the set-off claimed by respondent should not be allowed because it was owed by L. A. Blunck personally. The evidence showed that L. A. Blunck had been running the business of the corporation and that the letter initiating the negotiations for the sale of the apples involved in this case was signed by L. A. Blunck individually. It was held that the corporation can not take advantage of Blunck's negotiations in this matter and at the same time escape this indebtedness since the amount arose out of a transaction similar to that involving the present controversy. The remainder of the set-off claimed by respondent arose out of a purchase and sale transaction between the parties. This can not be allowed for the reason that debts or demands in a representative capacity can not be used as a set-off in a transaction where the parties are acting individually.

Respondent denied any agreement to pay complainant $25 per car commission. Furthermore complainant was not acting in the capacity of a broker; he was engaged as a selling agent by the purchasers and his proposal that he be employed and paid by respondent for consigning his principal's goods to it to be sold on a commission basis, unless known to and approved by the purchasers, would be contrary to the elementary principles of law of agency, for an agent to sell may not accept remuneration from two principals whose interests may conflict. There being no showing that the growers representing the complainant had knowledge of this arrangement this claim was denied.

It was shown that 5% on carlot tracks sales had been established as the rate of commission by the course of dealing between complainant and respondent and that on the first two cars involved in this controversy a charge of only 5% was made. Before respondent would be justified in increasing the rate of commission on a carlot track sale it would have been necessary for respondent to notify complainant that it would not longer continue to sell for its account at that rate.

Rulings included in Decision

1. An agreement to make an advance on a car consigned for sale on account does not guarantee net returns equal to the advance unless there is a specific agreement to this effect.

2. A corporation can not take advantage of negotiations conducted by one of its officers as an individual and at the same time escape indebtedness incurred by that officer in connection with transactions of a similar nature.

3. Amounts due one party from another because of the loss incurred in connection with another transaction can not be allowed when the parties were acting individually in the first transaction but the party from whom the money is due is acting in a representative capacity in the second transaction.

4. An agent to sell receiving remuneration from shippers can not claim a commission from the receiver to whom he consigns goods for sale on account.

5. Where a rate of commission has been established between parties by a course of dealing and the same rate was charged at the beginning of another transaction the receiver is not justified in increasing the rate without notifying the shipper and giving him an opportunity to take his business elsewhere if he does not choose to pay the increased rate.

S-647, March 13, 1934, Docket 1247: (S.P.)

H. A. SPILMAN, WASHINGTON, D.C. vs. J.S.MOON COMPANY, INC., LYNCHBURG, VA.

Violation charged: Failure to account.
Principal point involved: Flagrant violations.
Order: Case dismissed, without prejudice, with a fiew to reopening if respondent again engaged in business.

Outline of Facts

In December, 1932 and February, 1933, the Adams Packing Co., Inc. shipped to respondent to be sold for the former's account, two cars of citrus fruit; in March, 1933, the Maine Potato Growers, Inc. shipped to respondent to be sold for the former's account, two cars of potatoes; during March and April, 1933, the South Carolina Produce Association shipped to respondent approximately 30 dozen carrots and 18,510 pounds of cabbage at the agreed purchase price of $149.55. Upon arrival at destination respondent accepted all of the above shipments and disposed of same but failed to account to the consignors, with the exception of accounting partially to the Adams Packing Co. Inc. Complainant is an employee of the Department of Agriculture.

Ruling included in Decision

1. While the facts alleged in the complaint were established or admitted by respondent and would ordinarily warrant disciplinary action by a suspension or revocation of the license, no such action could be taken for the reason that the license had already expired. In view of the circumstances the case was dismissed without prejudice with a view to reopening in the event that respondent again engages in business or endeavors to obtain a license under this Act.

S-648, March 16, 1934, Docket 1179: (Hearing)

RICHMAN & SAMUELS, INC., NEW YORK CITY, vs. CLOWE & DAVIS, INC., WASHINGTON, D. C.

Violation charged: Rejection without reasonable cause.
Principal points involved: Written contract may be subsequently modified by agreement of parties if original contract did not provide against such subsequent agreement; condition of lettuce.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the sale and purchase of a car of Iceberg lettuce containing 312 crates at the agreed price of $1.15 per crate, plus $30 for special top ice, totaling $338.80 f.o.b. shipping point. The broker's standard memorandum of sale provided that the lettuce was "subject to inspection and acceptance on arrival". Federal inspection made upon arrival stated that there were "10% grade defects chiefly tip burn" and in addition thereto "an average of 8% shows slimy decay."

Complainant contended that this being an f.o.b. sale the defects due to tip burn and slimy decay did not show that the lettuce failed to conform to the contract, and that it was merchantable lettuce at the time it was shipped.

Respondent's witnesses testified in substance that a car of lettuce had been previously ordered from the complainant and upon inspection the lettuce was found to contain slime and was refused; that the car in controversy was to take the place of the one containing slime and the complainant was advised that this car must be free from slime upon acceptance at Washington; that the car was to be absolutely satisfactory here, and if it was not the respondent did not have to take it. This testimony was not denied.

Ruling included in Decision

1. It is well settled that a written contract may be modified by a subsequent oral contract where there is no provision in the written contract by which the parties agree that it cannot be modified or changed by subsequent oral contract. The Supreme Court has so held in Canal Company vs. Ray 101 U. S. 522. The syllabus in that case reads in part: "The terms of a contract under seal may be varied by subsequent parol agreement." In view of this ruling it was decided that the lettuce did not conform to the contract of purchase and sale and therefore the complaint was dismissed.

S-649, March 14, 1934, Docket 1091: (S.P.)

PALUMBO ARATA FRUIT COMPANY, FRUITLAND, IDAHO, vs. S. WEIDERMANN, SAN ANTONIO, TEXAS.

Violation charged: Rejection without reasonable cause.
Principal point involved: Reversal of shipping point inspection certificate.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent a carload of Idaho bulk apples to contain one-third Ganos and two-thirds Arkansas Blacks. Respondent rejected upon arrival stating that 50% were blemished and bruised on account of the handling and spraying; 5% decay; 5% specked with decay; and that the shipping point inspection was reversed on account of the apples being dirty. Respondent also stated that the bill of lading permitted inspection on arrival.

Shipping point inspection stated under "condition": "Apples are mature, clean, Ganos are ripe and Arkansas Blacks are generally firm. No decay. Apples grade Idaho Combination Extra Fancy, Fancy and 'C' grade". Upon arrival respondent had an appeal inspection which stated under "condition": "Blacks are mostly firm, but many are firm ripe; Ganos are generally ripe. About 5% of blacks and 3% of Ganos show decay, Blue Mold Rot present in early stages. 15% to 25% of Blacks show badly spotted or pitted, numerous small to medium sized, discolored, sunken spots with underlying flesh discolored and corky - apparent Fruitspot." Under "Quality" the inspector stated: "Generally well or fairly well shaped and smooth; Blacks well colored for the grade; Ganos fairly well colored; grade defects, mainly open worm holes, average well within tolerance. Ganos and most Blacks show excessively dirty, black, gummy dirt adhering closely to skin of fruit, and affecting general appearance. Also about a fourth of Ganos are very badly bruised - one or more large, deep, discolored spots." Under "Grade" the inspector stated: "Ganos and Arkansas Blacks fail to grade Combination, Extra Fancy, Fancy and C grade of Idaho State, account being excessively dirty, and also account Ganos badly bruised, as described above."

Rulings included in Decision

1. From the fact that the apples throughout the load were "excessively dirty" and that the "black gummy dirt" adhered "closely to the skin of the fruit", it was evident that the dirt was present at the time of loading. The record disclosed that a portion of the dirt was leaf hopper residue and that some of the dirt was due to the waxy coating on the Arkansas Blacks to which dirt adheres, and was not washed off in the washing process. The difference in the findings of the shipping point inspector and the destination inspector may be easily understood in view of the circumstances surrounding the shipping point inspection. According to the affidavit of the shipping point inspector, these apples were being washed at the time of inspection. It would have been most difficult for the inspector at shipping point to have found this condition on apples of such deep red color due to the recent washing of the apples. However, after drying, leaf hopper residue and the waxy coating caused the condition of the apples as found by the destination inspector, which resulted in the reversal of the shipping point inspection. In addition to the Federal inspection at destination, there was a commercial inspection which showed substantially the same condition as did also the inspection by the respondent.

2. Due to the reversal of the shipping point inspection certificate, and due to the excessive dirt, the complaint was dismissed, as the facts did not show a violation of the Act by the respondent.

S-653, March 16, 1934, Docket 1136: (Hearing)

BENZ BROTHERS & CO., TOPPENISH, WASH. vs. DUTHIE COMPANY, INC., LEWISTON, IDAHO.

Violation charged: Failure to deliver.
Principal point involved: Respondent not licensed at time of transaction and not subject to provisions of Act.
Order: Case dismissed.

Complainant purchased from respondent two carloads of Blue Tag certified Netted Gem seed potatoes at $15 per ton f.o.b. Lewiston, Idaho. Respondent delivered one car but complainant alleged that it failed to deliver the second car and complainant was compelled to buy a car of potatoes at $15.50 per ton f.o.b. Craigmount, Idaho and that by reason of a higher freight rate of $2.20 per ton from Craigmount to Toppenish over the rate from Lewiston to Toppenish complainant suffered a loss of approximately $39.91; that respondent was further indebted to complainant for $1.00 representing a shortage of one bag of potatoes in the first car; that by reason of respondent's failure to fulfill the contract complainant suffered an additional loss of $10.35, representing telephone and telegraphic charges required to correspond with respondent and to repurchase a car of certified seed potatoes at Craigmount, Idaho; that complainant suffered a total loss of $51.26.

Respondent contended that it advised complainant it would be unable to furnish the second car of stock similar to the first on the written contract but would furnish selected potatoes or potatoes of like quality, and that Paul Benz of the complainant company agreed to advise at once what further stock would be required, if any; that not being so advised respondent believed that complainant expected no further shipment; that respondent suffered a loss of $135 on account of a delay of ten days on the part of complainant to pay the draft on the first shipment made on the written contract; that respondent was not licensed under the Act at the time of this transaction and was shipping only produce of its own raising, including the shipment under consideration.

Ruling included in Decision.

1. The record did not show that respondent was a commission merchant, dealer, or broker, as those terms are defined under the Act and respondent having failed to secure a license at the time of the transaction in question, the Secretary was without jurisdiction under the Act in this case, and the complainant's complaint was dismissed.

S-655, March 16, 1934, Docket 991: (Hearing)

W. S. BLAKE, HOULTON, MAINE, vs. COHEN BROTHERS, NEW YORK, N. Y.

Violation charged: Rejection without reasonable cause.
Principal point involved: No agreement between buyer and seller as to specific size of potatoes and hence no contract.
Order: Case dismissed.

Outline of Facts

On January 16, 1933, respondent placed an order for one carload of potatoes to be good size and color U. S. No. 1 Green Mountain, with William Clark, Jr. & Son, Inc., a broker located at New York City, who in turn placed the order with William P. Callahan Co., a broker located at Caribou, Maine. William P. Callahan Co. secured the acceptance of the order by complainant and on that day issued a broker's Memorandum of Sale wherein the commodity was described as "one car Green Mountain potatoes, U. S. No. 1 in bulk" and mailed copies to William Clark, Jr. & Son, Inc. and to complainant, and complainant thereupon loaded and shipped the car. On January 16, William Clark, Jr. & Son, Inc. also issued a Confirmation of Sale and delivered a copy to respondent wherein the commodity was described as "Green Mountain potatoes, good size and good color." Upon arrival of the shipment at New York respondent inspected and declined to accept the potatoes, stating that they were not of "good size". Complainant requested damages in the sum of $64.92, being the difference between the contract sale price and the amount received by complainant upon resale.

Rulings included in Decision

1. While the term "good size" is not a description of any definite size, yet by use of such description instead of grade U. S. No. 1 indicated that respondent and the buying broker had in mind a size different from the ordinary run of grade U.S. No. 1. On the other hand, the Confirmation of Sale issued by the selling broker indicated that complainant had in mind that an order had been received for grade U. S. No. 1 bulk Green Mountain potatoes without any other specification as to size. There was no agreement between seller and buyer as to the specific size of potatoes that would be furnished and hence no contract was created. Like conclusions were reached in other cases where the facts were somewhat similar. The case was therefore dismissed.

S-656, March 12, 1934, Docket 1266: (Hearing)

J. ABRAMS & CO., INC., NEW YORK, N. Y. vs. C. S. TIMMONS, SNOW HILL, MD.

The complaint in this case was consolidated with Dockets 1190 and 1265 and hearings held in Philadelphia. Separate orders have already been made in Dockets 1190 and 1265. At the hearing C. S. Timmons testified that he was insolvent and had filed a petition in bankruptcy. It appearing therefrom that such bankruptcy court has assumed jurisdiction in said bankruptcy matter and that the respondent's property will be distributed to creditors of said Timmons through said court, any order entered by the Secretary in this matter would be of little or no benefit to complainant. The complaint was therefore dismissed.

S-662, March 20, 1934, Docket 1182: (Shortened Procedure)

H. ROTHSTEIN & SON, PHILADELPHIA, PA., vs. PHIL LESHINE & CO., INC., NEW HAVEN, CONN.

Violation charged: Failure to account.
Principal points involved: Manifest on rolling car basis of contract.
Order: Reparation awarded complainant in the sum of $189.72.

Outline of Facts

Complainant sold to respondent through a broker a carload of Honey Dew melons at a total price of $834. The melons were sold f.o.b. Philadelphia, the car being in transit from Heber, Calif., and the destination was New Haven, Conn. Upon arrival of the car at New Haven it was discovered that the melons did not conform to the manifest as to sizes, and in addition Federal inspection showed that 15 per cent of them were slightly soft, 20 per cent were soft, many soft melons being slightly shriveled. The contract was based upon the manifest submitted by the complainant through the broker to the respondent and as the car was moving there was no opportunity for either the respondent or the broker to inspect the melons until they arrived at New Haven. The complainant admitted and the evidence established that the car of melons did not conform to the manifest. However, the complainant stated that the error was unintentional. The respondent wired to complainant advising of the condition of the car upon arrival and received the following reply from complainant: "SECURE FEDERAL INSPECTION HANDLE PROMPTLY ANYTHING WRONG WILL HAVE BROTHER CALL YOU SURE GIVE YOU SQUARE DEAL EXPECT YOU HANDLE PFE 8068 ADVISE." Later after considerable communication between the parties the respondent wrote complainant suggesting that respondent be given an allowance of $167 as settlement on the car.

Rulings included in Decision

1. Complainant erroneously described the melons in the manifest which formed the basis of the contract and respondent was within its legal rights in rejecting the car.

2. Due to representations of the complainant that respondent would receive a "square deal", the melons were accepted by respondent and thereafter it made a reasonable offer of settlement with the complainant, which should be accepted. Reparation was therefore awarded complainant in the sum of $189.72, which was the difference between the invoice price of $356.72 and the allowance of $167 requested by respondent.

S-664, March 20, 1934, Docket 1200: (Hearing)

UNITED BROKERS COMPANY, PORTLAND, OREGON, vs. SAMUEL ROSENBLUM, INC., and THOMAS F. WILSON & CO., NEW YORK, N. Y.

Violation charged: Rejection without reasonable cause.
Principal point involved: Complainant breached contract
Order: Case dismissed.

Outline of Facts

Complainant and Samuel Rosenblum, Inc. entered into a written contract through Thomas F. Wilson & Co. brokers, for the purchase and sale of ten carloads of U. S. No. 1 Oregon Danver onions, 2-inch minimum in 50-lb. open-mesh new bags at the agreed price of 95 cents per cwt. f.o.b. Portland, Oregon. The contract provided that the onions should be shipped on March 23, 1933, from San Francisco via the Dollar Line and also provided that any modification thereof should be in writing, with the further provision that neither party should rely on the oral representations or promises of the other. The written contract was not modified in writing and instead of the onions being shipped March 23, 1933 via the Dollar Line they were shipped March 25, 1933 via the Panama Pacific Line which docked at New York, N.Y. whereas the Dollar Line docked at Jersey City, New Jersey, the place where the respondent has its warehouse facilities.

Ruling included in Decision

1. The written contract stated that it was "subject to ability of United Brokers to obtain space on the steamer sailing from the Pacific Coast, March 23, 1933." If space could not be obtained on the Dollar Line on March 23 the complainant could have relied on that provision of the contract and not have shipped the onions, or could have endeavored to have obtained a written modification of the contract with a view to shipping at a later date on another steamboat line. The complainant did not avail itself of either option. The contract was breached by complainant and the case was dismissed. (A similar case was Benz Brothers & Co. v. H. Schnell & Co., Docket 839.)

S-666, March 22, 1934, Docket 949: (Hearing)

WILLIAMS FRUIT COMPANY, YAKIMA, WASHINGTON, vs. CALIFORNIA BROKERAGE CO., SAN FRANCISCO, CALIF.

Violation charged: Failure to account.
Principal point involved: Whether apples were sold outright or consigned.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent three cars of apples and that respondent refused to pay the agreed purchase price, except the sum of $1109.44, and there was a balance due complainant in the sum of $470.81.

From an exchange of correspondence and telegrams between the parties it was evident that complainant well knew that the respondent was not purchasing these cars but that they were to be distributed after arrival by respondent for complainant's account. This the respondent did, and after deducting brokerage remitted to complainant the sum of $1109.44. Further, it was evident that the prices which respondent quoted in the telegrams could not be considered as a sale price but merely an indication as to what the respondent thought the apples would bring on his market.

Ruling included in Decision

1. The complainant having alleged that there was a contract should have proved same by a preponderance of the evidence. This it wholly failed to do and accordingly the complaint was dismissed.

S-668, March 22, 1934, Docket 863: (S. P.)

F. B. CROVO, JR. CO., WASHINGTON, D.C. vs. LLOYD GARRETSON CO., YAKIMA, WASHINGTON.

Violation charged: Failure to deliver in accordance with contract terms.
Principal point involved: Complaint not filed within 9 months of the time the cause of action accrued.
Order: Case dismissed.

Outline of Facts

Respondent sold complainant a car of apples, extra grade Delicious, delivered Washington, D. C. Complainant alleged that inspection made at destination stated that the apples failed to meet the contract specifications of Washington extra fancy.

Ruling included in Decision

1. The cause of action herein arose on or about April 1, 1933 and no complaint was filed with this Department "at any time within nine months after the cause of action accrues" which was April 1, 1933. It becomes unnecessary to review the evidence in this case since the nine months provision is jurisdictional and therefore the complaint must be dismissed.

S-669, March 27, 1934, Docket 770: (Hearing)

MISSOURI FRUIT EXCHANGE, NEOSHO, MO., vs. S. STROCK & COMPANY, BOSTON, MASS.

Violation charged: Rejection without reasonable cause.
Principal point involved: No compliance with Statute of Frauds.
Order: Case dismissed.

Outline of Facts

Complainant alleged that it sold to respondent one carload of strawberries at $3.00 per crate, sold while in transit f.o.b. Anderson, Mo.; that the sale was negotiated by O. H. Willson, a broker of Lockport, N. Y. who acted as agent for respondent; that upon arrival in Boston the respondent refused to accept the car and it was resold by complainant for the net sum of $627.15 and complainant was damaged in the sum of $716.85.

At the hearing the respondent relied upon two contentions; first, that complainant had failed to show that a memorandum had been written so as to comply with the Statute of Frauds and, second, that the strawberries did not meet the quality requirements of the contract. The Government inspection at destination showed that the berries did not grade U. S. No. 1.

Rulings included in Decision

1. It has been repeatedly held under this Act that a contract must be in compliance with the Statute of Frauds to be enforceable under this Act. The States of Massachusetts and Missouri have substantially adopted the Seventeenth Section of the Statute of Frauds which provides in effect that a contract to sell or a sale of any goods or choses in action in the value of $500 or upward shall not be enforceable unless the buyer shall accept part of the goods and accordingly receive the same or give something in earnest to bind the contract or part payment or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf. In the State of Missouri the sum is changed from $500 to $30. The complainant made no attempt to show that the buyer paid part of the contract price or that the buyer accepted part of the goods. The car was in Kansas City, a diversion point, at the time the sale was entered into and the buyer's agent, Willson, did not have the opportunity to inspect nor did he do any act which indicated an acceptance on the part of the buyer even if he had been authorized to do so.

2. The main contention of the complainant was that there was a note or memorandum signed by this respondent. The record indicated that the broker was completely out of this phase of the transaction since it was admitted that he did not issue a memorandum or sign any papers on behalf of his principal. It is necessary that the note or memorandum contain all the essential terms and conditions of the contract. It is not necessary that the memorandum be a single paper but it must refer to another paper and if the chain of papers set out all the essential terms, that is a sufficient memorandum. From a consideration of the two telegrams from respondent offered in evidence by complainant, which were all the writing in the record signed by respondent, it clearly appeared that they did not comply with the above decision in that they did not contain all the essentials of the contract. It was therefore necessary to dismiss the complaint inasmuch as the contract was unenforceable.

S-670, March 27, 1934, Docket 598: (Hearing)

BURNAND & COMPANY, INC., LOS ANGELES, CALIF., vs. JOSEPH ROTHENBERG, BUFFALO, N. Y.

Violation charged: Rejection without reasonable cause.
Principal points involved: Method of payment for car; no binding contract.
Order: Case dismissed.

Outline of Facts

Complainant's contention was that respondent contracted to buy from complainant a car of Mexican peas and agreed to deposit the purchase price in the Federal Reserve Bank but did not do so and this amounted to a rejection of the car. Complainant resold the car at a loss.

The purported contract was entered into through an exchange of telegrams between the parties, the last telegram from complainant to respondent reading: "ANSWERING CONFIRM OUT TODAY DUTY PAID THREE THIRTY SIX CRATES PEAS PFE FOUR NINE SIX THREE PLEASE DEPOSIT FEDERAL RESERVE BANK FOR FIRST NATIONAL BANK HERE FOR US EIGHTEEN HUNDRED DOLLARS." There was not included in the record a telegram from respondent showing that it agreed to the conditions as set forth in the preceding telegram. It was clear from above quoted telegram that for some reason the complainant had made the provision for deposit in the Federal Reserve Bank of the purchase price, a part of the contract. Several telegrams passed after this in which the question of drawing draft was raised by respondent and even in one place the respondent agreed to wire the money, but there was no indication whatever that respondent ever agreed to the method of payment as suggested and made a part of the offer by the complainant. The respondent contended that it had been the custom in prior dealings to pay by draft.

Ruling included in Decision

1. A thorough consideration and review of the telegrams in the record must lead to only one conclusion, that there was not a valid and binding contract for the purchase of this car inasmuch as the respondent never fully agreed to the terms of the offer. There being no valid and binding contract the complainant could not maintain an action on its complaint.

S-672, April 6, 1934, Docket 1072: (S.P.)

W. H. MARTIN, BANGOR, MAINE, vs. S. JACOBS & COMPANY, PORT CHESTER, N.Y.

Violation charged: Rejection without reasonable cause.
Principal point involved: No contract.
Order: Case dismissed.

Outline of Facts.

Complainant alleged that it sold to respondent one carload of U. S. No. 1 potatoes at a total price of $380, the sale being negotiated by William Clark, Jr. & Son, Inc. broker for complainant; that when the car arrived at Port Chester respondent rejected and complainant resold the potatoes for respondent's account; that complainant

was damaged in the sum of $20, being the difference between the original price of the car and the amount received upon resale.

Respondent stated that there was absolutely no grounds for the complaint; that on March 16, 1933, respondent phoned the broker asking for the price of potatoes and was told that they were 97½¢ per sack; that respondent then advised the broker that potatoes could be bought for 95¢ and the broker said that 97½¢ was his price; that respondent gave them no order at any price and later that day bought two cars from other sources at 95¢ per sack; that on March 17 respondent received a confirmation from the broker for a car of potatoes at 95¢ which was immediately returned and respondent also immediately called the broker advising him that he had not ordered the potatoes and had already purchased two cars from other concerns; that respondent then received an invoice from the complainant for the potatoes and immediately wired the complainant stating the facts in more detail. Respondent submitted copies of telegrams and invoice sustaining the allegations made in its answer.

Ruling included in Decision

1. The evidence in the case was conflicting, and complainant failed to establish by a fair preponderance of the evidence that a contract was entered into between the parties and the case was dismissed.

S-680, March 29, 1934, Docket 1169: (Shortened Procedure)

Z.J.FORT PRODUCE CO., DENVER, COLO., vs. CICARDI BROS. FRUIT & PRODUCE CO. ST. LOUIS, MO.

Violation charged: Rejection without reasonable cause.
Principal point involved: Diversion of rolling car to apply on f.o.b. sale contract.
Order: Case dismissed.

Outline of Facts

On August 8, 1933, complainant and respondent entered into an agreement through a broker for the sale and purchase of a carload of bulk cabbage, 2 to 5 pounds, good quality, at $23 per ton, f.o.b. shipping point, shipment August 8. The car was shipped from loading point in Colorado on August 4 and diverted on August 8 from Kansas City, Mo. to respondent at St. Louis, Mo., arriving there on August 9. Respondent rejected the car upon its arrival assigning the fact that the cabbage had wilted leaves and a very stale appearance. Later respondent presented an additional defense that the car arrived three days earlier than contemplated by the contract, respondent having

expected it to arrive on the 12th. Complainant introduced telegrams from the broker showing that it was advised to apply either a roller or today's shipment on the respondent's order and accordingly applied a roller at Kansas City, which explained the arrival in St. Louis on August 9.

Rulings included in Decision

1. There was nothing in the record to indicate that the respondent knew the nature of the correspondence between the complainant and the broker. Therefore it was necessary to determine if the respondent violated the Act in refusing to accept the car upon the basis of the written confirmation. This confirmation specified shipment August 8. The car was actually shipped August 4. Also the confirmation called for an f.o.b. car and the car was a roller. There is a sharp distinction between a rolling car and a car billed out of shipping point after the formation of a contract and due principally to the difference in time of arrival it is clearly necessary that the purchaser be advised whether the contract is to be filled by a rolling car or a car billed out of shipping point after the formation of the contract. The record clearly indicated that the complainant breached the terms of the contract and the respondent had reasonable cause to reject the car at St. Louis. The case was therefore dismissed.

S-681, March 26, 1934, Dockets 1070 and 1070-A: (Shortened Procedure)

UNITED BROKERS COMPANY, PORTLAND, ORE., vs. J. H. BRESHEARS & SON, PORTALES, NEW MEXICO and COUNTERCOMPLAINT.

Violation charged: Failure to account.
Principal point involved: Consignor must pay deficit incurred in selling consignor's produce.
Order: Reparation awarded United Brokers Co. in the sum of $171.09, with interest.

Outline of Facts

Complainant and respondent entered into an agreement through correspondence whereby respondent shipped to complainant to be handled on a consignment basis one carload of sweet potatoes containing 625 baskets. Complainant advised respondent of the bad market conditions for sweet potatoes at Portland, Oregon, but at the insistence of the respondent, complainant sold the sweet potatoes for the best prices obtainable, resulting in a net deficit of $171.09. Respondent failed to pay the deficit and complainant requested reparation in that amount.

Respondent filed a countercomplaint which was apparently based upon the sale of another car of potatoes at San Francisco, and also contended that there was negligence on the part of the United Brokers Company in handling the sweet potatoes.

Rulings included in Decision

1. No evidence of negligence on the part of the United Brokers Co. in disposing of this car was submitted and negligence can not be presumed from the fact that there was a deficit. Therefore, the failure of J. H. Breshears & Son to pay the United Brokers Co. the deficit incurred in handling the car was a violation of the Act. Reparation was awarded the United Brokers Co. in the sum of $171.09, with interest.

2. The countercomplaint of J. H. Breshears & Son against the United Brokers Co. was dismissed.

S-682, April 11, 1934, Docket 1097: (S. P.)

DAWSON PRODUCE COMPANY, TULSA, OKLA. vs. SPROWL FRUIT CO., MISSION, TEXAS.

Violation charged: Failure to deliver in accordance with contract.
Principal points involved: Diversion of rolling car to apply on f.o.b. sale contract; measure of damages.
Order: Nominal damages of $1.00 awarded complainant.

Outline of Facts

Respondent sold to complainant through a broker one carload of onions at 90¢ per sack f.o.b. Robstown, Texas. The broker's memorandum of sale provided for shipment of the onions on or before May 20, 1932, weather permitting, and routed the shipment over the "M.K.T." Railway. On May 19 respondent loaded a car of onions at Robstown, Texas, and consigned same to itself at St. Louis, Mo. The car moved out of shipping point May 20 at 10 o'clock A.M. over the Missouri-Pacific lines. At 6 o'clock P. M. May 20 respondent notified the carrier's agent to divert the car to complainant at Tulsa, Okla. and because of interrupted telegraph service the carrier did not transmit the diversion order to the proper officers and agents of the railroad in time to accomplish diversion of the car at Houston, Texas. Because of this the shipment did not arrive at Tulsa, Okla. until May 24, which was approximately one day in excess of the usual and ordinary running time from Robstown, Texas, to Tulsa, Okla. Complainant requested damages in the amount of $117.30, due to the failure of the car to arrive on time, this being the difference between the market quotations on the 21st and the 24th when the car actually arrived. Aside from the statement calling attention to the market reports the complainant failed to show or explain its damages.

Rulings included in Decision

1. The car was purchased on an f.o.b. basis. Regardless of this fact, and without permission in the contract to use a roller, the respondent attempted to divert a roller and failed. Had the respondent complied with its contract as to an f.o.b. car the car would have been billed out of shipping point to the complainant over the desired route; therefore respondent breached its agreement in that the car did not move over the desired route and regardless of its attempt to secure a proper diversion it can not be relieved of the responsibility. Had the car been shipped as specified the question of diversion would not have entered the matter.

2. The true measure of damages is the difference between the value of the car as actually delivered and its value on the date it should have been delivered. There was nothing in this record to show the value of this car as delivered. Complainant having failed to properly prove its damages it could only be awarded nominal damages in recognition of the breach of the contract by respondent. Reparation was therefore awarded complainant in the sum of $1.00.

S-684, April 17, 1934, Docket 1190: (Hearing)

LEVINSON PRODUCE CO., MIDDLETOWN, N. Y. vs. C. S. TIMMONS, SNOW HILL, MD. and STOUT BROS., NEWARK, N. J.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Endorser or guarantor of contract for shipper assumes obligation to fulfill terms of such contract if principal fails.
Order: Reparation awarded complainant against Stout Bros. in the sum of $2,511.00, with interest, and facts ordered published.

Outline of Facts

Complainant and respondent, C. S. Timmons, entered into a contract in writing wherein Timmons agreed to sell and deliver to complainant five carloads of Irish Cobbler potatoes of the 1933 crop, grade U. S. No. 1, to be packed in barrels, at the price of $1.40 per barrel f.o.b. loading point in the Eastern Shore of Maryland, shipments to be made in carload lots of approximately 200 barrels each and to commence on July 5, 1933 and be completed on July 10, 1933. At the time of the execution of the contract between complainant and Timmons, the respondent Stout Bros. endorsed and guaranteed that shipments would be made by Timmons upon the dates specified in the contract by adding thereto the following language: "We hereby guarantee shipment on dates specified. Stout Bros." W. D. Stout testified that this

endorsement of the contract was necessary because the year before Timmons "was a little tardy in the shipments and Mr. Levinson would not sign the contract unless the dates were specified, to be shipped on the specified dates." Complainant paid Timmons the full purchase price in the sum of $1400.00 at the time of the execution of the contract.

Timmons delivered one carload under the contract but failed to make further deliveries. He testified that he had entered into contracts with the owners of land or those having possession thereof whereby Timmons furnished seed, spray and other costs and received a certain share of the potatoes raised; that in excess of 100 acres were covered by such contracts and normally he should have received as his share between 40 and 50 carloads of potatoes; that due to hot weather and lack of moisture the yield of potatoes in the Eastern Shore territory was reduced to approximately one-third of the normal yield; that the share of the said Timmons from the acreage above specified totaled five carloads, one of which was delivered to complainant, the remaining four carloads being shipped to other purchasers with whom Timmons had entered into similar contracts; that he was without funds to buy potatoes on the market and on account of lack of credit he was unable to make delivery to complainant of the additional four carloads. On July 4, Timmons advised Stout Bros. that he would be unable to make deliveries under the contract but notwithstanding this knowledge Stout Bros. did not make shipment of the four additional carloads to complainant or cause shipments to be made by Timmons.

Complainant claimed damages in the total sum of $4,455.00. On this phase of the case Levinson testified that if the potatoes had been delivered on the dates specified "the market in which I could have sold them was $5.50 a barrel. I was to pay $1.40 a barrel and my loss and damage because of the failure was $4.10 a barrel. The contract called for 1,000 barrels and I received 190. I had coming to me 810 barrels which at $4.10 a barrel amounts to $3,321.*** Because of the failure to deliver these potatoes under the contract I was compelled to buy potatoes in the Virginia exchange and New York market and I was compelled to pay $4.50 f.o.b. shipping point for the Virginia exchange potatoes and in the New York market I paid anywhere from $4.75 to $5.25 per barrel. I also was compelled to borrow potatoes from Levinson and Sivertts and Zwick and Schwartz to fulfill the contracts which I had made depending upon these deliveries." C. S. Timmons testified that the 1933 price was from $4.00 to $4.50. He evidently referred to the f.o.b. shipping point price per barrel. His testimony in this respect was substantially the same as that of Levinson.

Rulings included in Decision

1. It has already been held in PACA Docket 1265 that Timmons displayed such a degree of recklessness and disregard of contract obligations as to amount to unfair practice in the sale and marketing of said potatoes, and that his failure to deliver was without reasonable cause and in violation of Section 2 of the Act. It developed at the hearing in the present case that Timmons filed a petition in bankruptcy on December 22, 1933. It has been the settled policy of the Department (1) to decline to entertain a complaint wherein a reparation award is prayed for when it is shown that a petition in bankruptcy by or against respondent has been filed; (2) to discontinue further procedure in connection with pending complaints unless jurisdiction is continued under direction of the bankruptcy court as authorized by Title II U.S.C.A. Sec. 103 of the Bankruptcy Act; and (3) to retain jurisdiction for the purpose of entering a disciplinary order under the provisions of Sections 7 and 9 of the Act in appropriate cases. As the disciplinary feature of the complaint against the respondent Timmons was disposed of in PACA Docket 1265, and in the absence of any request from or direction made by the bankruptcy court for the entry of findings of fact in the complaint against Timmons, it was concluded that such complaint should be dismissed.

2. The commissions to be earned by Stout Bros. and the consideration supporting the main contract (the payment of the full purchase price) were deemed a sufficient consideration for the making of the endorsement by Stout Bros. When Stout Bros. found it impossible to have delivery made by Timmons the endorsement provision became operative. There was no suggestion that Stout Bros. could not as a guarantor of performance by Timmons have purchased potatoes and have made delivery of the remaining four carloads. This was the essence of its obligation assumed by its endorsement of the principal contract. Its failure so to do under the facts and circumstances shown by the record was without reasonable cause within the meaning of Section 2 of the Act.

3. With regard to the damages claimed by complainant the Uniform Sales Act, Section 67, states: "Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no

time was fixed, then at the time of the refusal to deliver." Reparation was therefore awarded complainant against Stout Bros. in the sum of $2,511.00, being the difference between the contract price, $1.40, for 810 barrels of potatoes which the respondent Timmons failed to deliver, and the f.o.b. market value thereof on and between the 5th and 10th days of July, 1933.

S-691, May 1, 1934, Docket 1002: (Hearing)

LAMANTIA BROS. ARRIGO CO., CHICAGO, ILL., vs. GAMBLE ROBINSON CO., MINNEAPOLIS, MINN.

Violation charged: Failure to account.
Principal points involved: Dispute over terms "rolling acceptance" and "delivered" in contract; "Good quality" strawberries; condition of berries at delivery point indicating condition when title passed.
Order: Reparation awarded complainant in the sum of $229.53, with interest.

Outline of Facts

After an exchange of telegrams and telephone conversations between the broker and complainant and the broker and respondent, the broker issued a memorandum of sale setting forth the terms of the contract as one car Florida strawberries, good quality, express car, ten cents per pint delivered Chicago, precooled, initial ice, rolling acceptance. From the testimony of the witnesses it appeared that the broker's memorandum of sale as set forth above correctly stated the terms of the contract as agreed upon by the wires and telephone conversations. It further appeared that the broker was acting as agent for both parties and was fully authorized to make the said memorandum, and delivered same to both parties. No objection was made to this memorandum by either party.

The car was initially shipped from Dover, Florida and after this sale was consummated was diverted at Chicago to respondent in Minneapolis. Upon arrival of the car at Minneapolis it was inspected some forty-five minutes later by the Moorhead Inspection Bureau, which stated "five to 75% soft leaky rot showing no mold to slightly, other heavy mold. Most of crates show 20 to 40% decay. Heaviest decay in third and fourth top layers crates". There were no defects usually of field origin. The following morning the respondent broke the car, and having previously sold portions of the contents to some seven or eight dealers in Minneapolis delivered the assigned quantity to each. Upon inspection of the various crates respondent discovered the decayed condition and wired the complainant requesting Federal inspection, which was made. At the time of the Federal inspection the stock was in the houses of the various purchasers and

was identified only by the statement of the broker, but there was nothing in the record to indicate that the broker misled the inspector. The respondent did not pay the full purchase price but did pay the sum of $623.37 which was the express charge from Dover, Fla. to Chicago, and properly chargeable to the complainant, thereby reducing the sale price from $1728 to $1104.63. Complainant requested damages in the sum of $1104.63.

Rulings included in Decision

1. The gist of the dispute in this matter was in the terms "rolling acceptance" and "delivered". As both terms were in the contract it was necessary to interpret the contract with a consideration being given to both terms. Chicago was merely a diversion point and under the terms of the contract title passed to the respondent at Chicago under the specification rolling acceptance delivered Chicago.

2. The burden of proof was upon complainant to prove that the car complied with the contract, which provided for good quality. Good quality is an indefinite term but it may certainly be said that a specification of this kind requires the produce to be in a merchantable condition. The complainant was given the opportunity at the hearing and subsequent thereto to show the condition of the car either at shipping point or at Chicago. The car was not inspected at Chicago and the complainant wholly failed to show its condition or quality at time of shipment from Florida. The inspections at Minneapolis may be used to indicate to a certain degree the condition of the berries at Chicago and because of the heavy decay shown therein it must be said that the berries did not meet the specifications of good quality at Chicago. Under the terms of the contract complainant was liable for the deterioration in transit to Chicago and the respondent thereafter.

3. Having determined that the complainant breached the contract and the respondent was within its right in refusing to pay the full purchase price it became necessary to determine what amount was due the complainant. The respondent should pay the reasonable value thereof since it accepted same. The car realized the net sum of $852.90 at Minneapolis. This sum deducted from the sale price of $1728 left $875.10, the difference between the contract price and the actual value of the car as delivered. The balance due the complainant on the contract price was $1104.63, but respondent was entitled to a set-off in the sum of $875.10 because of the poor condition of the strawberries, leaving a balance of $229.53, which was granted the complainant as reparation.

S-692, May 2, 1934, Docket 983[illegible] (S.P.)

RUSSO-CANNATA CELERY COMPANY, COLUMBUS, OHIO, vs. R. C. SHREVE, ROCHESTER, N. Y.

Violation charged: Failure to deliver in accordance with contract.
Principal point involved: Condition of f.o.b. shipment of celery upon arrival at destination, shipped under ventialtion as ordered.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a written contract whereby the respondent contracted to sell to complainant a carload of celery in perfect condition at the time of shipment at the agreed price of $1.87\frac{1}{2}$ per crate, or a total of $468.75. The car was shipped under ventilation by order of the complainant through its broker. Upon arrival Federal inspection showed that it was not in perfect condition but contained an average of 20% decay

Rulings included in Decision

1. This was an f.o.b. shipping point contract and the Standard Memorandum of Sale provided that the celery was to be "sound and in perfect condition when loaded." The point to be decided was whether or not the celery conformed to the specifications of the contract at time it was shipped. The evidence submitted by respondent showed that the celery did conform to the contract at the time of shipment and also showed that shortly before the transaction in question another car of celery of the same grade was bought by complainant from respondent and taken from the same storage, which was shipped under refrigeration, arrived in a satisfactory condition. Since this was an f.o.b. shipping point sale it was for the complainant, who was a buyer, to specify how the celery should be shipped and the evidence clearly disclosed that it was ordered shipped under ventilation and not refrigeration. The complainant failed to establish by reasonable preponderance of the evidence that the celery did not conform to the contract of sale and therefore the complaint was dismissed.

S-699, May 4, 1934, Docket 902: (S.P.)

W. G. GODFREY, SALISBURY, MD. vs. KING PRODUCE CO., BALTIMORE, MD.

Violation charged: Failure to account.
Principal point involved: Commission merchant must account and remit for goods consigned to him.
Order: Reparation awarded complainant in the sum of $62.64, with interest.

Outline of Facts

Complainant consigned to respondent to be sold for the former's account, 112 baskets of cucumbers, 174 baskets of lima beans and 3 crates of huckleberries. The commodities were transported by truck. Respondent accepted and sold the produce for the account of complainant and received therefore the net sum of $428.25. Respondent remitted at that and other times sums in payment aggregating $365.61, leaving a balance due complainant of $62.64. Respondent did not deny the obligation and in a letter to the Department J. L. King, after stating that King Produce Co. had liquidated, assumed the obligation and promised to pay the whole account as quickly as possible.

Ruling included in Decision

1. Respondent's failure to fully account and remit for the produce consigned to him was a violation of the Act and reparation was awarded complainant in the sum of $62.64, with interest.

S-701, May 8, 1934, Docket 861: (Hearing)

W. J. PIOWATY CO., CHICAGO, ILL. vs. AMERICAN DISTRIBUTORS, INC., EXMORE, VA.

Violation charged: Failure to account.
Principal point involved: Respondent's business in hands of receiver.
Order: Reparation awarded complainant in the sum of $55.25 with interest.

Outline of Facts

On Oct. 27, 1931 respondent shipped to complainant on consignment one carload of sweet potatoes to be sold for respondent's account. Complainant notified respondent that it was unable to dispose of the sweet potatoes at Chicago and suggested diversion elsewhere. Respondent thereupon requested complainant to handle the diversion, after which complainant shipped the car to Milwaukee, Wisconsin where, following federal inspection which disclosed the potatoes were badly decayed, it was disposed of and a deficit in the amount of $55.25 was incurred.

Ruling included in Decision

1. There seemed to be no contention but that the deficit alleged was actually incurred by complainant while acting as agent for respondent. Under the circumstances, it would appear that complainant was entitled to reparation in the amount claimed. However, respondent discontinued all active operations in the late summer or fall of 1932 because of its financial condition and at a meeting of its board of directors it determined upon liquidation and dissolution. All the records of respondent were turned over to its local attorney, C. M. Langford, Jr., Esq., Exmore, Va. with instructions to collect outstanding accounts and distribute the same among the few claims pending against the company. Mr. Prettyman, of respondent company, said that the amount due the corporation was far in excess of the amount the corporation owed, but unfortunately the money due and payable to respondent was uncollectible. Because of this situation the order was served on Mr. C. M. Langford, Jr., de facto receiver of respondent, Exmore, Va.

S-704, May 9, 1934, Docket 888: (Hearing)

TRI-STATE SALES AGENCY, PITTSBURGH, PA., vs. AMERICAN DISTRIBUTORS, INC., EXMORE, VA.

Violation charged: Failure to pay brokerage.
Principal point involved: Broker entitled to fee.
Order: Reparation awarded complainant in the sum or $44, with interest.

Outline of Facts

During the year 1932 respondent employed the complainant as its broker to sell sweet potatoes, in carload lots, and being so employed as respondent's broker, complainant sold in all, six carloads of sweet potatoes and alleged that it was entitled to receive brokerage for services in negotiating such sales in the sum of $44. Respondent admitted owing $34 brokerage but made some objection to paying the sum of $10 brokerage on one car which was sold to R. A. Hatch, Altoona, Pa., stating that the consignee refused to accept the car and it was sold for freight charges. The record disclosed that the broker successfully negotiated the sale but that the sweet potatoes furnished by respondent did not comply with the contract specifications and were properly rejected by the purchaser.

Rulings included in Decision

1. Since complainant showed by a preponderance of evidence the nature and extent of respondent's indebtedness to him, reparation should be awarded for the entire amount claimed. However, respondent corporation is in process of liquidation and dissolution and Mr.C.M. Langford, Jr., Exmore, Va. is de facto receiver thereof, for the reason that he has been instructed by the board of directors to collect outstanding claims due the corporation and apply the proceeds upon its indebtedness. The decision was therefore served upon Mr. Langford in lieu of respondent.

S-705, May 5, 1934, Docket 1222: (Hearing)

HENRY SETRON, CHICAGO, ILL., vs. GENNIS-SPEILLER, INC., UTICA, N.Y.

Violation charged: Failure to account
Principal point involved: Buyer must pay for goods purchased.
Order: Reparation awarded complainant in the sum of $378.64, with interest.

Outline of Facts

Complainant sold to respondent one carload of Colorado cantaloupes delivered Utica, N. Y., and the latter accepted the car but failed to pay the purchase price in the sum of $378.64. The respondent did not deny the purchase and acceptance of the car nor did it contest the amount claimed.

Ruling included in Decision

1. Respondent's failure to pay for the car of cantaloupes was a violation of the Act and reparation was awarded complainant in the sum of $378.64, with interest.

S-706, May 5, 1934, Docket 1270: (Hearing)

SHACKELFORD-BROWN COMPANY, ALBANY, GA. vs. GENNIS-SPEILLER, INC., UTICA, N. Y.

Violation charged: Rejection.
Principal point involved: Color of watermelons and merchantibility.
Order: Reparation awarded complainant in the sum of $147.05, with interest.

Outline of Facts

A contract was entered into between the parties through a broker by means of telephone and telegraphic communications and the broker issued a memorandum of sale to both principals. The broker's memorandum of sale called for one car of 28 pound average weight Thurman Grey watermelons at $90 f.o.b. shipping point, and was received by respondent prior to arrival of the car. The respondent made no objections to the specifications therein but upon arrival of the car rejected on the ground that the melons were of a pale color and unmerchantable. Upon rejection of the car it was abandoned by complainant to the carrier who sold it to William H. Dunne of Norwich, N. Y. for the gross sum of $175.00 whereby complainant sustained an additional loss in the amount of $57.05, there being due the carrier thereon for freight and other charges the sum of $232.05. Mr. Dunne testified that the melons were generally mature, sweet and palatable and that they sold well.

Ruling included in Decision

1. The contention of the respondent that the implied warranty of the merchantability of the melons was breached because their meat was of a lighter shade of red than was normal in Thurman Grey watermelons was not successfully shown. The fact that the dealer who subsequently purchased them found them to be palatable and received no complaints from his customers strongly indicated that they were in fact merchantable and edible. It was therefore determined that the contract specifications were met by the complainant and the rejection by respondent without reasonable cause and in violation of the Act. The complainant was awarded reparation in the sum of $147.05, with interest, or the net sale price plus the $57.05 deficit incurred through forced resale of the watermelons.

2. Respondent corporation is no longer in business and its officers are now affiliated with a new corporation of similar name. Because the new corporation was not made a party to this proceeding, all reference thereto has properly been stricken from the record.

S-711, May 11, 1934, Docket 1234: (S.P.)

LEON BROS., INC., BUFFALO, N.Y. vs. A. B. BENNETT, HOLLY HILL, S.C.

Violation charged: Failure to account.
Principal point involved: Obligation of commission merchant to advise consignor.
Order: Case dismissed.

Outline of Facts

Respondent consigned to complainant one carload of sweet potatoes to be sold for respondent's account. Respondent could have obtained 50¢ to 55¢ per bushel for the potatoes at Holly Hill, the shipping point, but due to the representations made in the several telegrams from Leon Bros. that the prices of good sweet potatoes were from $1.00 to $1.15, the potatoes were shipped to Leon Bros. Complainant alleged that there was a deficit incurred in the sum of $155.18, which respondent failed to pay. Leon Bros. sold 175 bushels for 75¢ per bushel, 110 bushels for 10¢ per bushel, 50 bushels for $27.27 and 79 bushels were dumped. Bennett contended that the car contained 650 hampers of high grade sweet potatoes, thoroughly cured, which if they had been handled by Leon Bros. Inc. would have sold for about $700, which, after deducting freight and legitimate expenses and including a draft of $260, would have left Leon Bros. owing Bennett $150, which amount respondent claimed as reparation.

Ruling included in Decision

1. In view of the representations made by Leon Bros. in regard to the price, if the potatoes were in any such condition upon arrival as the above might indicate, certainly it was incumbent under the circumstances upon Leon Bros. to have advised Bennett in order that the latter might have taken such steps as necessary to have the potatoes inspected, or otherwise to protect his interests. Considering the record as a whole, it was not believed that reparation should be awarded against Bennett for the deficit incurred. The complaint was therefore dismissed.

2. Bennet submitted no proof establishing his claim other than the allegations in the counter-complaint and the counter-complaint was also dismissed.

S-718, May 28, 1934, Docket 1261: (S.P.)

THOMAS M. RINI, INC., CLEVELAND, OHIO, vs. MICHAEL, SWANSON & BRADY PRODUCE CO., IDAHO FALLS, IDAHO.

Violation charged: Failure to deliver in accordance with contract.
Principal points involved: Buyer entitled either to reject or to accept car not meeting contract specifications and seek reparation for loss.
Order: Reparation awarded complainant in the sum of $84.75, with interest.

Outline of Facts

Complainant and respondent entered into a written contract for the purchase and sale of one carload of U. S. No. 1 Idaho Russet Potatoes, to contain 50 to 75% eight ounces and larger. Upon arrival of the car at Cleveland complainant obtained a federal inspection, which certificate showed that the potatoes did not conform to the terms of the contract of purchase in that they did not grade U.S. No. 1, and further failed to conform to size as specified in the contract. Complainant sold the potatoes and submitted a detailed statement showing the loss sustained by reason of the potatoes not conforming to the contract and requested reparation in the sum of $88.75. The cost of labor for resorting was voluntarily omitted by complainant but included in the statement was $4.00 for the government inspection certificate.

Respondent contended that if the potatoes were unsatisfactory they should have been rejected immediately before the complainant started unloading.

Ruling included in Decision

1. Complainant could have rejected the car but it also was entitled to have accepted the car and seek reparation for the difference between the grade and size of the potatoes called for in the contract of sale and the kind and size of the potatoes actually furnished. The complainant elected to pursue the latter course. Reparation was awarded complainant in the sum of $84.75, with interest.

2. The inspection certificate was evidence of complainant's claim and was not properly allowable as reparation.

S-719, June 1, 1934, Docket 1173: (S.P.)

TOM AYOOB CO., PITTSBURGH, PA., vs. G. W. CAPPS, BACK BAY, VA.

Violation charged: Failure to deliver.
Principal point involved: No contract.
Order: Case dismissed.

Outline of Facts

Complainant alleged that through the Sales Service Co., a broker, it bought from respondent five cars of U. S. 1 potatoes at $1.75 per 100 lb. sack, f.o.b. Virginia; that respondent failed to make delivery of the potatoes and complainant was damaged in the sum of $1500, being $1.00 per bag profit based on actual sales at Pittsburgh by complainant on shipments purchased around the time and later sold on the open market on the basis of $3.20 per cwt.; that all efforts to substitute complainant's requirements on the open market at Pittsburgh and at shipping point were unsuccessful on account of scarcity of supplies and an advancing market.

Respondent stated that he received a telephone call from the Sales Service Co. in regard to the sale of potatoes. The broker was advised - "* * * the price was $1.75 per cwt., f.o.b. shipping point, Pungo, Virginia. A few minutes later they called back and attempted to place an order for five carloads for a customer whose name could not be understood over telephone, whereupon respondent requested Sales Service Co. to wire the name of their customer and upon receipt of wire respondent would wire them if could confirm. Upon receipt of the wire advising their customer to be Tom Ayoob Co., respondent immediately wired Sales Service Co., declining confirm Ayoob any cars for reason Baker Produce Co., of Norfolk, Virginia having sold this company two cars of potatoes for respondent's account and caused respondent severe losses."

The complainant and respondent submitted sworn statements squarely conflicting as to whether a contract of sale was entered into between the parties.

Ruling included in Decision

1. Complainant failed to establish by a fair preponderance of the evidence that there was such a contract entered into for the five carloads of potatoes and also failed to establish that it sustained any damages. The case was therefore dismissed.

S-703, May 5, 1934, Docket 1267: (S.P.)

SOL SIEFF, UNIONTOWN, PA., vs. TRUCK GROWERS ASSOCIATION, INC., CRYSTAL SPRINGS, MISS.

Violation charged: Failure to deliver.
Principal point involved: No contract.
Order: Case dismissed.

Outline of Facts

The broker, J. E. Nelson, called a representative of respondent on the telephone and attempted to enter into negotiations with a view to purchasing a carload of U.S. No. 1 tomatoes at $1.25 per lug, f.o.b. Crystal Springs, Miss. The conversation was unsatisfactory and indefinite and respondent's representative, being unable to understand just what was said by the broker, requested him to wire a confirmation of what he wanted to purchase, but instead of wiring what was desired the broker undertook to mail to respondent a confirmation which reached the latter four days later and at which time respondent was unable to fill the order as it had no tomatoes on hand for sale at that time. Respondent stated that due to the unsatisfactory connection over the telephone he was unable to ascertain the names of the parties to whom the shipment was to be made and denied that there was any contract of purchase entered into.

Ruling included in Decision

1. The complainant failed to establish by a fair preponderance of the testimony that there was a contract of purchase and sale and a breach thereof by respondent, and the complaint was therefore dismissed.